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ABSTRACT

This document consists of the speeches given at the 1972 New Jersey School Law Forum. The Forum is held to encourage the research of timely legal issues involving the structure and operation of the New Jersey public schools, to assist the school law practitioner by affording him the opportunity to hear and discuss research and opinion on selected topics, and to provide a vehicle for the preservation and dissemination of school law research. The subjects presented in the speeches are (1) the 1871 Civil Rights Act and its effect on board member liability; (2) the emancipation of 18-year-olds and its effect on the doctrine of "in loco parentis"; (3) sex discrimination in school employment practices; (4) non-tenured teacher dismissal; (5) drafting a management grievance clause; (6) proper evidence and tactics in processing a grievance; (7) arbitrability and the restraint of arbitration; and (8) sex equality in student athletic activities. A related document is ED 063 667. (JF)

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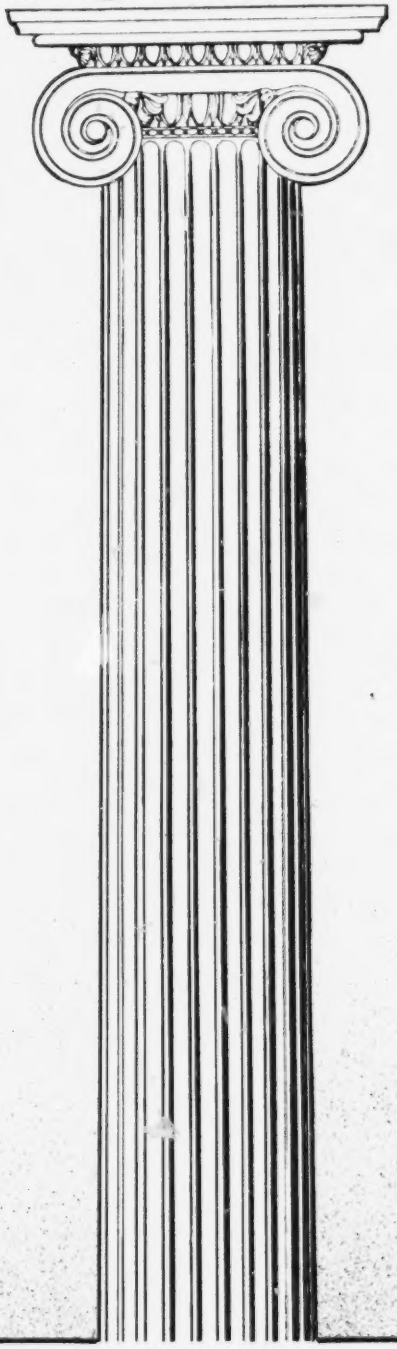
SCHOOL LAW FORUM



Atlantic City, N. J.
October 19, 1972

Sponsored by:
The New Jersey
School Boards Association

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The New Jersey Association of
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About the Forum . . .

For many years, the New Jersey Association of School Board Attorneys accepted the responsibility of planning "attorneys' sessions" which were held in conjunction with the Annual Workshop of the New Jersey School Boards Association.

In an effort to expand the service which was rendered by these sessions, the New Jersey School Boards Association joined with the Attorneys' Association and the National Organization on Legal Problems of Education (NOLPE) to develop and sponsor a more formal approach which would draw on a large pool of legal and administrative talent, to tackle a broad area of issues in school law on a non-partisan basis.

The purpose of the School Law Forum is thus threefold:

- To encourage the research of timely legal issues involving the structure and operation of the public schools of New Jersey;
- To assist the practitioner of school law by affording the opportunity to hear and discuss research and opinion on selected topics in the highest tradition of the classic forums and academies;
- To provide a vehicle for the preservation and dissemination of school law research, through publication of a Journal of the Proceedings of the Forum.

The success of the present School Law Forum will assure the future of this format. That more programs of this type will be generated cannot be doubted, so long as the government of this most densely populated state continues the largest and most important public enterprise -- that of educating its young people.

At this time it is appropriate to dedicate the work of this School Law Forum to all those individual attorneys and educators whose efforts have brought the practice of school law in New Jersey to the point where this School Law Forum has been made possible.

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The 1871 Civil Rights Act - Individual Liability for Board Members?

R. JOSEPH FERENCZI, ESQ.

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There has been increasing concern that board members will be sued individually under provisions of the 1871 Federal Civil Rights Act, for damages arising from the interference with the civil rights of another.

The Federal Civil Rights Act[1] states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities, secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

The effect of the Act regarding individual liability of school board members was brought to focus by the decision in Lucia v. Dungan,[2] decided by the United States District Court for the District of Massachusetts. A teacher was dismissed from employment and one of the reasons stated by the board was that he was guilty of wearing a beard which was against

the board's understood but unwritten policy. The teacher alleged that he developed an ulcer, could not sleep and lost weight as a result of his dismissal. The Court reinstated the teacher with a judgment for back pay together with an award of compensatory damages and costs of suit. The board was not a party defendant. The judgment was against the individual members of the board who voted for the dismissal. The judgment comprised $1,575.00 awarded for back pay and $1,000.00 for compensatory damages plus costs. The decision was not appealed.

The Act has been the basis of suits against individual board members in other jurisdictions and it is the basis for suits pending in New Jersey. Most of the suits have centered around the non-renewal of non-tenure teacher's contracts or dismissal for other reasons. The most significant case in this state is LaBattaglia v. Board of Education of the Borough of Glassboro, et als.[3] The plaintiff in the Glassboro case seeks a judgment:

(1) declaring that a board of education deciding not to renew the employment contract of a probationary teacher must provide the teacher with a written statement of reasons.

(2) declaring that a teacher is entitled to a hearing with respect to the statement of reasons, and

(3) for damages against individual board members who voted not to renew the employment contract of the probationary teacher.

The first two thrusts of plaintiff's case, namely, that a written statement of reasons for non-renewal and that a hearing on the statement must be afforded the teacher should be disposed of by the recent decisions of the United States Supreme Court in Board of Regents v. Roth,[4] and Perry v. Sindermann,[5] both decided June 29, 1972. Simply stated, the Roth decision confirms the position previously taken by the Commissioner of Education and the courts of this state that nothing in the United States Constitution requires a board of education in states like New Jersey, when not renewing the contract of a probationary teacher, to give the teacher a written statement of reasons for such non-renewal or a hearing with regard thereto.

The Perry decision on the other hand does not apply to non-tenured teachers in New Jersey because it deals with a teacher who allegedly had de facto tenure as a result of policies and practices of the employer institution, but, it is submitted, there can be no such de facto tenure under the school laws of this state.

It should be noted that in both Roth and Perry, the Court emphasized it is state law which determines whether a teacher has any right to re-employment that is entitled to due process protection. New Jersey law has already denied such right to probationary teachers.

The third thrust of the Glassboro case squarely raises the issue of whether a teacher is entitled to recover in a damage claim against individual board members under the Federal Civil Rights Act for having been deprived of his constitutional rights claimed in the complaint.

If the plaintiff could prevail in a damage claim against individual board members the ramifications are alarming. It necessarily follows that a board would rarely dare to let any employee go for fear that in a protracted and expensive federal court suit it might be found that the board did not have adequate grounds for non-renewal of employment, and that the board's action therefore was arbitrary and unreasonable, and that accordingly the constitutional rights of plaintiff were violated and the board members were personally liable in damages. It is clear that this restriction on individual board members would result in hesitancy or refusal to take necessary and appropriate action against undesirable teachers or those who do not meet the standards of the district.

The action should not be construed to allow compensatory damage awards against board members individually for acts arising out of the performance of their official duties. Public boards and members are cloaked with immunity from damage actions arising out of the performance of their discretionary duties. Although there is authority to the effect that this immunity is conditioned upon the absence of "bad faith" or "malice", the better rule is that immunity is

absolute. If that is not the law, board members cannot function freely and without the fear of personal liability.

It is submitted that Lucia v. Dungan, supra, should not dictate the decision in the Glassboro case, and that it should be held that the Federal Civil Rights Act has not abbrogated the immunity generally available to individual members of boards of education in the performance of their official duties, and, further, that this immunity is absolute. The law is clear that when immunity is properly invoked it constitutes a defense to an action for damages under the Act.[6] Appointments and reappointments to a school faculty can be made only at a public meeting and by a majority vote of the whole board.[7] It is one of the most critical governmental functions performed by the board involving the exercise of considerable discretion and judgment.

The United State Supreme Court in the Pierson[8] case settled the question of immunity under the Federal Civil Rights Act of 1871 when it stated:

> "We do not believe that this settled principle of/ the immunity of public officers from suit/ was abolished by Sec. 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L. Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

It is well established that inferior officers of the state, such as school officials, at common law enjoy at least a conditional privilege in connection with the performance of their official duties; and that they will not be held liable in tort actions, such as defamation, in the absence of bad faith or malice.[9]

The Courts in some federal jurisdictions, however, have held individual board members in employment cases responsible civilly, holding that such officials enjoy only a qualified immunity dependent on good faith action. It is submitted that this is not the law in the Federal Circuit nor as established by decisions in New Jersey, New York and elsewhere where the doctrine of absolute immunity for members of school boards has been adopted. The theory for the absolute immunity doctrine was clearly stated by the eminent Judge Learned Hand in Gregoire v. Biddle.[10] The Court held that executive officials of the federal government had an absolute immunity from a suit to recover damages for the false arrest of the plaintiff as an enemy alien. Judge Hand said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case may be tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable

> danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[11]

The Court of Appeals for the First Circuit also adopted the same rationale in Drown v. Portsmouth School District,[12] wherein the Court reiterated that administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time, expense and personal discomfort of litigation, and as a result "the schools would be left with a teaching force of homogenized mediocrities."

The New Jersey Supreme Court has adopted in substance the public policy considerations established in the Gregoire case. In Visidor Corp. v. Cliffside Park[13] the municipality was sued for damages for a business loss allegedly occasioned by a wrongful installation of one-way street signs. The signs were erected without an enabling ordinance. The Supreme Court unanimously upheld the trial court's dismissal of the damage claim. Mr. Justice Jacobs remarked that

"certain types of government activity must remain free from any resulting damage claims because they are properly viewed as nontortious or are otherwise deemed immune for controlling policy reasons."[14] In particular, he noted that prior decisions established the general rule that "discretionary as distinguished from ministerial activities" do not give rise to liability and where a determination involves a matter of judgment, local officials "should be free to determine it without fear of liability either for themselves or for the public entity they represent."[15] The opinion concluded with the following significant words:[16]

> "Here, as throughout the law, a balancing of the pertinent factors should be determinative. See Jaffee, supra, 77 Harv. L. Rev., at p. 219. On that approach we are satisfied that the Borough's action is fairly and justly to be viewed as nontortious or as otherwise immune and that the damage claim must consequently fail. This result is in full accord not only with the judicial precedents but also with the modern legislative trends. It serves to protect municipalities against endangering financial demands and to permit their governing bodies to govern conscientiously for the public interest, as they find it, without the fears and burdens of litigating such demands. It does this while preserving very effective and expeditious remedies, perhaps more freely and broadly available in our State than in any other [Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 661 (1957)], for the setting aside of invalid official action."

The courts of New York have reached the same result by applying the doctrine or label of absolute privilege.[17] The Appellate Division in the Smith case,[18] said:

> "The members of the Board of Education of a city school district have wide executive and administrative

> powers in the management and control of the educational affairs and interests with its charge***. In executing their duties, the members perform a state function of high importance to the people at large and within the city***. Hence, the defendants are clothed with an absolute privilege for what is said or written by them in discharging their responsibilities***."

Since under New Jersey law the making of employment contracts and their termination as provided therein are matters resting within the discretion of the board, it is submitted that such actions cannot give rise to a suit in tort. Indeed such acts cannot lead to any legal redress at all unless they violate the employee's constitutional or statutory rights.[19] It was so held in Zimmerman v. Board of Education of Newark, where the Supreme Court passed upon the powers of the board of education to hire and fire. These powers are limited, said the Court, by the Fourteenth Amendment of the United States Constitution, by the New Jersey Constitution, by the Teacher's Tenure Act, and by other statutory provisions such as the Law Against Discrimination. The opinion then made this significant statement:[20]

> "Except as provided by the above limitations or by contract the board has the right to employ and discharge its employees as it sees fit."

Thus, it is submitted, by implication the Supreme Court has clearly indicated that the alleged presence of malice or ill will on the part of the board in such cases does not vitiate an action which otherwise comes within the discretionary power of the board. This view accords with the

general rule that a municipal corporation is not liable in damages for the manner of exercising its discretionary functions.[21] Although nonliability is sometimes predicated on the absence of malice or bad faith, the majority of jurisdictions apply the rule of immunity notwithstanding allegations that the act complained of is willful or induced by corrupt motives.[22]

Also in point here is the decision of the Appellate Division of the New Jersey Superior Court in O'Connor v. Harms,[23] which involved a suit against individual school board members and others arising out of the dismissal of a principal pursuant to a 60 day cancellation clause set forth in his employment contract. The Appellate Division held that even though the defendant board members may have entertained some malice against the plaintiff when exercising their legal right to discharge him, this action was taken in the exercising of their legal powers as board members to vote on a board resolution concerning school affairs; that it was their duty as public officials to cast their votes according to the dictates of their individual consciences; and that the exercise of the board members' legal right to terminate plaintiff's contract in what they conceived to be the public interest was not converted into an actionable wrong because of ill will toward the employee.

No action should be entertained against the individual board members personally in this state for the reasons set

forth in Gregoire v. Biddle and Visidor Corp. v. Cliffside Park. If suits are allowed against individual school board members, few would be willing to risk the consequences to both the school district and themselves of failing, for example, to renew the contract of an employee who does not measure up by reason of an antagonistic personality, difference in educational philosophy or approach, inability to work well in an organization or similar intangible factors, the board members may honestly and subjectively believe that certain action should be taken to maintain the educational standards of the district; yet the board may be strongly deterred from making this type of decision under the threat of personal liability. However, the Glassboro case is pending at this writing and the question of absolute immunity is undecided. In the interim, individual members of school boards may be subject to suit and possible liability for their actions.

N.J.S. 18A:12-20 provides as follows:

> "Whenever a civil or a criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the cost of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, shall be borne by the board of education."

It should be noted, however, that the statute does not contain a "save harmless" clause although legislation is currently pending in order to have the provision added. It

should be noted that N.J.S. 18A:16-6, on the other hand, which covers employees of the board specifically provides that the board "shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses."

In most instances, a school district's general liability coverage does not extend to protect board members individually nor employees against actions under the Federal Civil Rights Act. It is submitted, however, that N.J.S. 18A:12-20 is sufficient authority in law to purchase such liability insurance for individual board members and in effect mandates that some sort of indemnification be provided because the courts have made it clear that all the assets of a school district are available to satisfy a judgment against any individual agent of the district.[24]

The specific insurance coverage to protect individual board members and its employees is know as "errors and omissions liability coverage." At this writing my investigation reveals that there are two domestic companies writing errors and omissions coverage in this state through their respective agents. Both carriers have a $1,000.00 deductible. Thereafter, each of the companies has varied maximum limits of coverage for any one loss as well as annual aggregate losses. The premiums are based primarily upon the number of children attending school in the dsitrict and which of the

three forms of coverage available is purchased, to wit: board members only, board members and certain named employees, or board members and all employees. If any board seeks further information, I suggest it contact its broker or Stewart, Smith Management Corporation, 277 Forest Avenue, Paramus, New Jersey, 07652, or Robert L. Frings Company, 355 Chestnut Street, P.O. Box 897, Union, New Jersey, 07083. The two agents are given for informational purposes and are not to be construed as an endorsement of either or both by the writer.

1. 42 U.S.C.A. Sectic 1983

2. 303 F. Supp. 112 (1969)

3. United States District Court for the District of New Jersey, Civil Action No. 886-71.

4. 33 L. Ed. 2d 548 (1972)

5. 33 L. Ed. 2d 570 (1972)

6. Pierson v. Ray, 386 U.S. 547 (1967); DeFelice v. Philadelphia Board of Education, 306 F. Supp. 1345 (D.C. Pa. 1969), affirmed on opinion below 432 F. 2d, 1358 (1970)

7. N.J.S. 18A:27-1

8. See footnote 6.

9. Restatement of Torts, Section 595d; Somers Construction Co. vs. Board of Education, 198 F. Supp. 732 (D.C. N.J. 1961)

10. 177 F. 2d 579 (C.A. 2d 1949), Cert. Denied 339 U.S. 949

11. 177 F. 2d, at page 581

12. 435 F. 2d 1182 (C.A. 1st 1970), cert. denied May 17, 1971

13. 48 N.J. 214 (1966)

14. 48 N.J. at page 218

15. 48 N.J. at page 221

16. 48 N.J. at pages 223-224

17. Thompson v. Union Free School District, 45 Misc. (N.Y.) 2d 916, 264 N.Y.S. 2d 126 (Sup. Ct. 1965), Smith v. Helbraun, 21 A.D. 2d 830, 251 N.Y.S. 2d 533 (1964)

18. See footnote 17.

19. 38 N.J. 65, 70 (1962)

20. 38 N.J. at page 71

21. 63 C.J.S. Municipal Corporation, Sec. 749

22. See 63 C.J.S., Municipal Corporations, Sec. 749, and cases there cited.

23. 111 N.J. Super 22 (App. Div. 1970), Certification Denied 57 N.J. 137

24. Hartman v. Maplewood School Transporataion Co., 106 N.J. Super. 187, aff'd 109 N.J. Super. 497 (1970)

II

Emancipated 18 Years Olds- The End of Schools as Parents

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INTRODUCTION

On January 1, 1973, Chapter 81 of the Laws of 1972 containing a significant amendment to Title 9 of the New Jersey Statutes will become part of the effective law of this State. It will, except in a very few special instances, confer an emancipated status upon all persons who have attained eighteen years of age. Such an act will undoubtedly have a substantial effect upon the rights and obligations of this newly emancipated group, with coincident impact upon the legal relationships which each of us meet in our daily professional practice. The nature and scope of that impact upon the school-student relationship is what we have been asked to explore today.

I submit to you that the relationship between and eighteen year old public school student and educational

authorities will undergo little substantive modification as a result of this statutory emancipation. Indeed, the title assigned to this segment of the Forum is itself misleading, for the role of the school as parent has been effectively ended already. The term "in loco parentis" has lost much of its legal magic as a refuge and haven of school administrators seeking to regulate the activities of their students. The new legislation with respect to eighteen year olds merely serves to highlight the expiration of that doctrine.

THE "IN LOCO PARENTIS" DOCTRINE

I do not mean to suggest to you that all of the authorities that have utilized "in loco parentis" as a pet phrase are no longer viable. I do suggest to you that the doctrine has long been used inartfully and inappropriately to label results actually reached on the basis of other considerations. An examination of its history amply demonstrate this.

The doctrine developed literally in family law cases dealing with financial obligations for the support of minors.[1] It was first defined in New Jersey in 1855 as designating one "who means to put himself in the situation of the lawful father of a child, with reference to the father's office and duty of making provision for the child."[2] The same definition was restated on numerous subsequent occasions by our Courts over the years.[3] Three significant elements appear in the definition:

(1) It must be assumed intentionally;
(2) All legal duties of the parent must be assumed;
(3) All legal obligations are to be exacted by the one so acting.

The first case generally cited as transposing the "in loco parentis" theory into the area of school law is that of Gott v. Berea College, decided in 1913 by the Supreme Court of Kentucky.[4] Thereafter, the concept was used extensively in school law treatises, usually written by educators, rather than lawyers, and gained widespread popularity.[5] Most of those early cases used the doctrine to justify the infliction of corporal punishment upon a student by a teacher,[6] and it spread thereafter to virtually all areas of disciplinary and regulatory activities of teachers, administrators and boards of education.[7]

The literal application of the "in loco parentis" doctrine to a student-teacher relationship is clearly erroneous. The latter relationship is both limited and temporary; its limits are circumscribed by law; it exists coterminously with that of the natural parent-child relationship. We have seen the virtual abolition of legalized corporal punishment in the public schools of this nation.[8] The recognized right of school authorities to expel a student from school has no parallel in the parent-child-family relationship. The term is, in short, a legal fiction which is at best unnecessary and at worst misleading.[9]

It is interesting to note that even the decisions of our Commissioner of Education, which in the past have frequently resorted to use of the "in loco parentis" label, concede that the theory has only "limited application." Thus, in Gebhardt v. Hopewell Township Board of Education, 1938 S.L.D. 570, the "loco parentis" approach was used to justify a teacher's supervisory function in areas not specifically covered by board policy or regulation. Similarly, In the Matter of G, 1965 S.L.D. 146 at 149, in discussing the teacher-student relationship it was observed that "the teacher stands in a limited sense at least in loco parentis."[10] The advent of procedural due process for students in disciplinary proceedings[11] and the recognition by the United States Supreme Court in Tinker v. Des Moines[12] that students are "persons" within the meaning of the Constitution further demonstrate the inapplicability of the "in loco parentis" rationales to the contemporary student-teacher relationship. Judge Conford in his opinion in the Tibbs case in tracing the history some of the early due process precedents referred to the theory of "in loco parentis" as having then "held some sway"[13] but clearly rejected its present status as a viable principle.

THE EDUCATIONAL GOAL RELATIONSHIP

Rather than continuing to pay lip service to past anomalies like the "in loco parentis" doctrine, I suggest to you that disputes relating to the teacher-student relationship

should be analyzed on the basis of contemplated educational goals and resolved pursuant to statutory authority and limiting interpretations thereof relating to individual civil rights. The framers of the New Jersey State Constitution mandated that our State Legislature provide "a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years."[14] Pursuant to this mandate, the Legislature has provided through local boards a system of free public schools which it has made available as of right to persons "over five and under twenty years of age"[15] and attendance at which is mandatory for persons between the ages of six and sixteen, unless equivalent instruction is otherwise provided.[16] When a conflict between a public school teacher and a public student develops, its resolution ought to be pursued with three thoughts in mind:

(1) The primary goal of the school system is to educate its students.
(2) Each individual student has a right to a public school education.
(3) Each student has a right to be secure from disruption of his educational opportunities.

A dispute should first be viewed in terms of the educational goal of the public school system. While students as persons have individual civil rights, their exercise cannot be unrestricted where the same would lead to an educational disruption of the system or of the educational opportunities of other students. The label which one attaches to the solution is immaterial if it is approached in this perspective.

Ample precedent and authority exists for this approach without resort to the "in loco parentis" fiction. In N.J.S.A. 18A:11-1 the statute gives local boards broad rule making powers, and the boards administrators and employees in enforcing and interpreting those rules act as the agents of the board, not as parents of the students. Judge McGann in Board of Education of Borough of Palmyra v. Hansen, 56 N.J. Super 567 (Law Div. 1959), noted that local boards of education are creatures of statute and not of common law, and that those choosing to avail themselves of the free use of public schools must accept as a condition thereof the statutory restrictions so imposed by law.[17]

In 18A:37-1, the Legislature has specifically prescribed that "pupils in the public schools shall comply" with the rules established for their government and "submit to the authority of the teachers and others in authority over them." Moreover, under the provisions of N.J.S.A. 18A:38-7, any person entitled to or receiving free public education is required to accept such regulatory authority as a condition to accepting the educational benefits of the system, a codification of the theory of the Palmyra v. Hansen case.[18]

The right of school officials to regulate the conduct of students has been sustained judicially where such is, on analysis, reasonably designed to

(1) Prevent disruption of the educational program;

(2) Protect a student's own physical and/or emotional well-being;
(3) Protect the safety or well-being of other students, teachers or school property.[19]

In the case of R.R. v. Board of Education of Shore Regional High School District[20] the Court made the following comment in this regard:

> "There can be no doubt that the establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. Such are equally necessary for the protection of public school students, faculty and property."

While procedurally a board must be careful to afford students appropriate due process guaranties, its power to regulate and, where appropriate, to discipline is clear and is derived from the statute, not from an illusory "in loco parentis" relationship. Tinker and its adherents themselves recognize this basic right to regulate. It is not diminished by adherence to procedural safeguards or by occasional conflict with a student's personal rights which might require judicial resolution.[21]

The power to regulate clearly is vested in school authorities, if exercised in a procedurally correct manner and with due regard to the individual civil rights of the persons regulated. Conflicts among these principles should be examined and weighted on the basis of educational goals, concerns and effects and results reached accordingly.

THE EMANCIPATED EIGHTEEN YEAR OLD STUDENT- A PROBLEM

As most often happens with legislation which has basic political motivations, the precise effects of Senate Bill 992 on the education law must await further legislative and judicial refinement. The legislation is best summarized by its own statement of intent, namely that it is intended to extend to persons eighteen and older all of the basic civil and contractual rights and obligations heretofore applicable only to persons twenty-one years of age or older. While the statute then specifies a number of items which fall into the intended category, it rather clearly creates a general standard of emancipation achievable by merely attaining the age of eighteen at which one becomes an adult.

The only specific reference to the education law is contained in Section 2(c), which provides that the new enactment shall not be construed as altering the right of persons under twenty years of age to attend the public schools.

It is also interesting to note that the statement of legislative intent is qualified by the phrase "pending the revision and amendment of the many statutory provisions involved." If no subsequent revisions or amendments are made within a reasonable time of these "other" statutory provisions, will this be construed as an indication of legislative intent not to apply the provisions of the new statute in those areas? Certainly the door will be open to such an

argument in the near future if appropriate revisions in the other titles of the statutes are not made.

In the interim, the new bill must be construed in light of the Legislature's statement of intent but still in pari materia with other statutes not clearly within the areas contemplated by said statement of intent. Viewed in this context, few changes of any significance in the field of public education at the primary and secondary school level will be apparent.

The interplay of N.J.S.A. 18A:37-1 (requiring "pupils" to submit to the authority of their teachers) and N.J.S.A. 18A:38-7 (conditioning education on acceptance of statutory scheme) would, in my opinion, continue to subject eighteen year old students to regulations of the school district which meet the basic criteria generally applicable to any exercise of the regulatory function. Under N.J.S.A. 18A:38-1 any "person" over the age of five and under the age of twenty is free to become a "pupil" in a public school, but upon choosing to do so the "adult" pupil is equally subject, along with all other pupils, to the rules of the school system and authority of its teachers pursuant to N.J.S.A. 18A:37-1. Just as the married, and thus emancipated, pupil was subject to school rules and regulations so is the eighteen year old pupil.[22]

Likewise, the mere fact that an eighteen year old pupil may now be lawfully able to consume alcoholic beverages does not mean that he is free to do so while lunching in the school

cafeteria. The board could clearly prohibit such activity in view of the deleterious effect that it could have on the maintenance of general order and discipline throughout the system.

Under the new legislation there is no indication whatsoever that an emancipated public school student is in any way exempt from school regulations applicable to students generally.

One area of some concern to school authorities is that of access to pupil records of eighteen year old students. Under N.J.S.A. 18A:26-19, and the regulations of the State Board enacted pursuant thereto, such information was generally available to a parent or legal guardian. Since an eighteen year old student now will be considered an "adult" under the statute, it would seem as if access to such records would be available only to the eighteen year old himself, and not to his parent or guardian. There is presently before the Legislature a proposed amendment to N.J.S.A. 18A:26-19 which would, in part, mandate such a procedure. The bill is designated Senate Bill 857 and, if adopted, would read as follows:

> "All information in the records of a given pupil shall be made available, upon request, for inspection by a parent or guardian or other person having custody or control of the child, or his authorized representative; provided, that after the pupil has attained the age of eighteen years, the records shall be made available for inspection by the pupil or his authorized representative, and not to the parent or guardian."

While I would suggest to you that the same result would be achieved by a reasonable interpretation of the emancipation statute, it will be interesting to see what effect the defeat of Senate Bill 857 might have on any subsequent judicial interpretation in the area of student records.

The board will likewise retain a right to enact regulations relating to the conduct of eighteen year old students on field trips or similar activities away from the school campus itself and could validly, for example, preclude eighteen year olds from purchasing or consuming alcoholic beverages while so engaged. In this regard, Judge Lane in R.R. v. Board of Education of Shore Regional High School District[23] made the following observation:

> "In New Jersey, public school officials have the authority to suspend or expel students for events happening out of school hours.... This Court is unable to find a New Jersey decision holding that school officials have the right to expel or suspend a pupil for conduct away from school grounds, but the better view is that school authorities have such a right..."[24]

The legislation under discussion does nothing to alter that opinion.

Finally, one area that will be modified will be the scope of N.J.S.A. 18A:37-3, which now renders parents or guardians of pupils injuring school property responsible for damages in the sum of the expenses incurred by the board in repairing the same. Since eighteen year olds will after

January 1 be considered emancipated adults, they alone would then be responsible for said damages rather than their parents or guardians.[25]

After the effective date of the statute one can generally project that the one basic change in the interpretation of the education law is that whenever parental liability is imposed for student activities, that liability is transferred in the case of the eighteen year old from the parent to the student himself.

CONCLUSION

It would appear that board attorneys can anticipate little, if any, substantive change in the relationship of school authorities and eighteen year old students. While the emancipated student will be able to sue in his own name under the new statute, he will have no greater substantive basis to do so by reason of his new emancipation.

1. See 2 Pomeroy, Equity Jurisprudence (4th Edition) at Page 1023.

2. Brinkerhoff v. Merselis, 24 N.J.L. 680 (Sup. Ct. 1855).

3. Mott v. Iossa, 119 N.J.Eq. 185 (Chan. 1935); Schneider v. Schneider, 25 N.J. Misc. 180, 52 A.2d 564 (Chan. 1947). See also 67 C.J.S. at page 803 (Parent and Child, Sect.71) for other similar cases.

4. 156 Ky. 376, 161 S.W. 204 (1913). It was used on occasion with respect to private school students at an earlier date.

5. E.g., Trusler, Essentials of School Law (1st ed. 1929). See also Note, 72 Yale L.J. 1362 (1963), and

6. See Gott v. Berea, supra, Note 4.

7. Edwards, In Loco Parentis: Definition, Application and Inapplication, 23 So. Car. L.R. 114 (1971).

8. See N.J.S.A. 18A:6-1.

9. Developments In The Law - Academic Freedom, 81 Harvard Law Review 1045, 1144 (1968).

10. Contrast, however, Goodman v. Board of Education of South Orange-Maplewood, 1968 S.L.D. 88, in which it was said without qualification that: "Responsibility for the welfare of all pupils, while they are at achool, devolves upon the school staff who are placed in the status of the in loco parentis."

11. See Tibbs v. Board of Education of the Township of Franklin, 114 N.J. Super. 287 (App. Div. 1971), aff'd 59 N.J. 506 (1971); Scher v. Board of Education of West Orange, 1968 S.L.D. 92.

12. 393 U.S. 503 (1969).

13. 114 N.J. Super. 287 at 292 (App. Div. 1971). See also Goldberg v. Regents of University of California, 248 Col. App. 2d 867, 57 Col. Rptr. 463 (1967) which specifically repudiates the "in loco parentis" doctrine and Yegge, If You Trust The Beneficiaries You Don't Need Trustees, 3 Conn. L.R. 406 (1970) where the author observed: "one might say that 'in loco parentis' is dead as a pervasive legal doctrine in the educational setting, and properly so." Cf. Bugney v. Smily, 281 F.Supp. 280 (D. Colo 1968). Contra, Axtell v. La Penna, 323 F. Supp. 1077 (W.D. Pa. 1971); People v. Jackson, 319 N.Y.S. 2d 731 (1971).

14. New Jersey Constitution, Art. VIII, Sect. IV, Para. 1.

15. N.J.S.A. 18A:38-1

16. N.J.S.A. 18A:38-25

17. See also Hering v. State Board of Education, 117 N.J.L. 455 (Sup. Ct. 1937).

18. 56 N.J. Super. 567 (Law Div. 1959).

19. R.R. v. Board of Education of Shore Regional High School District, 109 N.J. Super. 237 (Chan. 1970). This case was cited as definitive by Judge Kolovsky in Tibbs, supra Note 11, whose opinion was adopted by reference by the New Jersey Supreme Court in its affirmance.

20. See Note 19, supra.

21. The authority of local boards to regulate fraternities, even in their off-campus activities has been conferred and sustained N.J.S.A. 18A:42-5, 6; Angelillico v. Board of Education of Manchester Regional High School District, 1964 S.L.D. 74.

22. Board rules must, of course, be reasonably calculated to achieve a valid educational objective, and they may not be arbitrary, capricious or vague. They must be such that they have a rational and substantial relationship to a legitimate educational purpose. See Angell v. Board of Education of Newark, 1959-60 S.L.D. 141; N.J. Good Humor, Inc., v. Bradley Beach, 124 N.J.L. 162 (E&A 1940). See also Pelletrearo v. Board of Education of Borough of New Milford, 1967 S.L.D. 35, reversed by State Board of Education as to result reached in 1967 S.L.D. 45.

23. 109 N.J. Super 337 at 344 (Chan. 1970).

24. See also Knight v. State Board of Education, 200 F.Supp. 174 (M.D. Tenn. 1961); 41 A.L.R. 1312 (1926) as supplemented by later case service.

25. See for example N.J.S.A. 18A:40-9 making it a disorderly persons offense for a parent not to remove the cause for a students exclusion from school.

Comments

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Although the general doctrine of In Loco Parentis has decreased in importance generally, there is one major area in which this doctrine, in my opinion, has been resurrected and revitalized in school law in many parts of the country. That is in its interplay with the Fourth Amendment and the question of illegal drug activity and weapons possession in the public schools.

As we all know, the school is the perfect petri dish in which the drug trade can cultivate and grow. Children are thrown together in many areas where there is opportunity to pass drugs and make sales. Teachers and administrators are hard put to protect the vast majority of good children from this horrible influence and to protect some students from themselves. This is where the doctrine of In Loco Parentis has been applied and is a viable concept.

The Fourth Amendment's prohibition against illegal searches has generally been construed to permit a search

only when either (1) a warrant has been issued authorizing it, (2) a valid arrest was made and an immediate search made in conjunction with the arrest, or (3) there is probable cause, and taking the time to get a warrant would frustrate the purpose of the search.

Of course, we are all familiar with the case of Overton v. New York[1], in which a narcotics conviction of a student was based on a search of a locker without a warrant by police with permission of the vice principal. The Court found that the vice principal had a duty to permit a search. It should be pointed out that in that case the nonexclusive nature of lockers was an important factor in the decision.

After that case there followed a line of cases which when placed chronologically and forgetting the defenses in jurisdiction, show an ever burgeoning utilization of the In Loco Parentis doctrine to overcome some of the prohibitions found in the Fourth Amendment. We start with cases involving lockers and allowing searches under the theory that the school authorities have joint control with the student in their use. We then turn to a case where the private person is searched as opposed to a locker, and this is permitted since the administrator is called a private person and not a governmental official. Then follows a case in which the school official is recognized as a state official and subject to the Fourth Amendment, but the search is permitted under the doctrine of In Loco Parentis.

In the case of State v. Stein,[2] the Court in dealing with a locker case used language deeming it a proper function of school authorities to inspect lockers under their control and to prevent their use in illicit ways or for illegal purposes.

In the case of In re Donaldson,[3] another drug case, the doctrine of In Loco Parentis was discussed, but the Court determined the search was done by a private person and not a governmental official, and therefore, the Fourth Amendment protections did not apply. The Court said, "The school stands In Loco Parentis and shares, in matters of school discipline, the parents' right to use moderate force to obtain obedience, and that right extends to the search of the appellant's locker under the factual situation herein related."

In the case of People v. Stewart,[4] we deal with a case involving the search of the person. A high school dean of boys had information from student informers respecting two students. He had them come into the office separately and directed them to empty their pockets, which they did. In each case he found envelopes of white powder and other narcotic works. He immediately summoned a city policeman who was in the building and the students were arrested. There was no search warrant obtained. The Court pointed out that there was no arrest made until the policeman arrived. The dean was not an agent of the police, nor was there a joint venture with the police. The Court stated that the dean was

an educator acting on information supplied by student informers. Thus, when a reasonable suspicion arose of something of an illegal nature occurring, the dean had an obligation to check it out.

In the case of Mercer v. State,[5] a principal directed a student to empty his pockets after receiving a tip and he found marijuana. The court found that the principal acted in the place of the boy's father and quoted the Restatement of Torts[6] which limits In Loco Parentis authority of a school to the purpose of the school's existence. This, of course, is a common sense approach and really grants great latitude to administrators.

In the case of People v. Jackson,[7] the Court considered the question of a body search. The coordinator of discipline had received information about a student in the school. While walking with him in the hall toward the office, the student bolted and a three block chase ensued. A police officer who was stationed in the building also chased the student. The teacher being faster than the policeman, the student was caught by the teacher who tackled him and found a set of works. He then turned over the findings to the police officer who came upon the coordinator and the student. The Court held that the disciplinarian had an affirmative obligation to investigate a charge and had a duty when suspicion arose to do so. The Court stated:

> "A school official standing In Loco Parentis to the children entrusted in his care, has the obligation to protect them while in his charge so far as possible from harmful and dangerous influences... (including the bringing to school by one of them of narcotics).... A school teacher, to a limited extent at least, stands In Loco Parentis to pupils under his charge and may exercise such powers of control, restraint and correction over them, as may be reasonably necessary to enable him properly to perform his duties as a teacher and may accomplish the purposes of education.... The In Loco Parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including search, taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable. Probable cause may not be imposed on a school official if he is expected to act effectively In Loco Parentis. While we have advanced from the days of the Little Red School House, such advancement has brought greater ills. Rampant crime and drug abuse threaten our schools and the youngsters exposed to such ills.... In consequence greater liability has fallen upon those charged with the well-being and discipline of these children."

In State v. Baccino,[8] a Delaware Court recognized that a school official was a state official and subject to the Fourth Amendment. This case concerned a vice principal taking a coat from a student to insure his going to class. The student would not give up the coat and there was a tug of war, after which the vice principal obtained possession, searched the coat, and found ten packets of hashish. Police were called and an arrest made. The Court pointed out that "even though school officials are state officials, they are subject to the Fourth Amendment." This does not mean the entire law of search and seizure is automatically incorporated intc the school system of a state. The Fourth Amendment protects

privacy of individuals, including students, but only after taking into account the interests of society.

In Delaware, a principal stands In Loco Parentis to pupils under his charge for disciplinary action, at least for purposes which are consistent with the need to maintain an effective educational atmosphere. It is a compelling state interest to be balanced against the prohibitions of the Fourth Amendment.

The In Loco Parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that a search taken thereunder upon reasonable suspicion should be accepted as necessary and reasonable.

For those of us in New Jersey, we have had no reported case in our state on which to rely concerning this subject matter. However, in a case just decided by Honorable Frederick C. Kentz, Jr., Presiding Judge of the Juvenile and Domestic Relations Court of Union County on October 6, 1972, the Court rendered an opinion which is extremely important to all of us.[9]

In that case a sixteen year old girl was brought to the principal's office after an anonymous phone tip had been received that she was selling pills to other students. She was informed of the charges and asked to allow herself to be searched. She agreed. A female teacher felt her pockets

and did a search of the body. They were given permission to check her pocketbook and found pills in her purse. The police were called and they identified the pills as amphetamines. The pupil was given a ten day suspension and a juvenile complaint was filed based on the findings. The Court pointed out that the admissibility of such evidence secured by a school administrator from a student was a question of first impression in New Jersey. The Court held that in New Jersey a school administrator is a governmental official subject to restraints of the Fourth Amendment, but that whether the action of the administrator was reasonable or not was a fact question and that it was "well to remember that when incriminating evidence is found on a suspect and that evidence is then suppressed...the pain of suppression is felt not by the inanimate state or by some penitent policemen, but by the offender's next victim..." The Court succinctly stated the question before it as follows, "The question that remains involves the circumstances, if any, that will permit public school administrators to nevertheless encroach on student rights. Phrased differently the issue may be stated thusly: Is the danger of illegal drug possession and sale by a student sufficient to justify an administrative search upon grounds of reasonable suspicion in order to safeguard student health and maintain an orderly academic environment?"

The Court did not make its decision on the so-called consent theory, but grounded it under the doctrine of In Loco

Parentis. It was found that the investigation was carried out with fairness and consideration and that the privacy rights of public school students must give way to an over-riding governmental interest in investigating reasonable suspicions of illegal drug use by such students, and that the gravity of the evil was sufficiently great both to the suspected individual and to those who might be victimized by drugs that the suspect makes available to override certain constitutionally protected rights. The Court then discussed the time honored concept of In Loco Parentis and found such procedure fundamental to the maintenance of an educational atmosphere.

The case in question reviews the various cases throughout the country on this subject within the past two or three years and concludes as follows:

> "I hold that in light of the reasonable suspicion that G. C. was illegally in possession of and selling dangerous drugs and in view of the overall fairness of the investigation and search that the public school principal, acting as a governmental officer and under the in loco parentis authority, made a reasonable search and seizure which was not violative of the Fourth Amendment."

I, therefore, must take exception to the conclusion of Mr. Fields as to the strength of the In Loco Parentis doctrine, especially as it exists in the above described area. It appears that the Courts are using this concept to make exceptions from the Fourth Amendment to allow for control by school administrators in the area of drugs, and I would

imagine this could be expanded to cover weapons in certain situations. With the recent bomb threats that many communities have had, it would appear to the writer that this concept is a viable method of making searches to protect all students as a surrogate father or mother would under the circumstances.

As to the effect of the new 18 year old law on this doctrine, there is no definitive answer. It is my feeling that there should be little, if any, difference. At least that is my hope. It would seem that as long as there are minor children in the system under the protection of the school administration, it is their duty to follow-out suspicions of evil doings that would affect those minors in their care and that this concern would override the constitutional protections of the Fourth Amendment. It is further my feeling that if an adult of 18 submits himself to the school situation he submits to the same relationship with the faculty as those under 18; and that since he is not forced to go to school after age 16, there should be an implied consent to be subject to all reasonable rules and regulations of the school and the law as it may apply to that situation. However, as to this question, only time will tell as to how the Courts decide.

1. 20 N.Y. 2d 360, 229 N.E. 2d 596, 283 N.Y.S. 2d 22 (1967), vacated and remanded 393 U.S. 85 (1968), original judgment affirmed 24 N.Y. 2d 522, 249 N.E. 2d 366, 201 N.Y.S. 2d 479 (1969).

2. 203 Kansas 638 456 P. 2d 1 (1968).

3. 269 Cal. App. 2d 599, 75 Cal. Rptr. 220, (Ct. App. 3rd Dist. 1969).

4. 313 N.Y. Supp. 2d 253 (Crim. Ct. N.Y.C. 1970).

5. 450 S.W. 2d 715 (Texas App. 1970).

6. 2nd ed., Secs. 152, 154 (1965).

7. 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (1st Dept. App. T. (1971).

8. 282 A 2d 869 (Del. Super 1971).

9. After this paper was presented and prior to publication, the case was approved for publication. The name of the case is State In the Interest of G.C., Docket No. 23-J-1299.

III

Sex Discrimination in School Employment Practices

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There have been a series of cases dealing with the subject of sex discrimination which require careful consideration. Strangely enough, none of the cases I have seen are any earlier than May of 1971. Dates are extremely important because of Title VII of the Civil Rights Act of 1964[1] as amended on March 24, 1972 by the Equal Employment Opportunity Act of 1972.[2]

The term "person" as that term now appears in the law[3] includes governments, governmental agencies and political subdivisions. Previously, they were not covered by the law.

The term "employer" does not include the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia.[4]

The language dealing with Exemptions now reads as follows:

"This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."5

The Conference Report on the Amendment to the Civil Rights Act of 1964 stated that:

"This section is amended to eliminate the exemption for employees of educational institutions. Under the provisions of this section, all private and public educational institutions would be covered under the provisions of Title VII. The special provisions relating to religious educational institutions in Section 703(e) (2) is not disturbed. Section-by-Section Analysis, Cong. Rec. (H 1862), March 8, 1972."

The House Committee Report has the following interesting language:

"There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of educational institution employees - primarily teachers - from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. House Committee Report No. 92-238, June 2, 1971."

Section 703(a) of the Civil Rights Act of 1964 as amended, prohibits discrimination because of an individual's race, color, religion, sex, or national origin.

N.J.S.A. 18A:6-6 provides as follows:

"No discrimination based on sex shall be made in the formulation of the scale of wages, compensation,

> appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school, state college, college, university, or other educational institution in this state, supported in whole or in part by public funds unless it is open to members of one sex only, in which case teachers of that sex may be employed exclusively."

See also N.J.S.A. 18A:28-10 and 18A:29-2. N.J.S.A. 10:5-12 (a) also prohibits discrimination because of sex.

With those preliminary observations, let us now direct our attention to the cases that have come down dealing with the subject of sex discrimination prior to and since the 1972 amendments to Title VII of the Civil Rights Act of 1964.

One of the earliest cases to uphold a regulation requiring a pregnant teacher to take a maternity leave at a fixed number of months prior to an expected delivery date was La Fleur v. Cleveland Board of Education, decided by the United States District Court for the Northern District of Ohio Eastern Division on May 12, 1971.[6] That case goes into a detailed discussion as to the reasons why the regulation was held to be valid, but it was reversed by the U.S. Circuit Court of Appeals, Sixth Circuit on July 27, 1972.[7]

In its reversal of the lower Court, the Circuit Court of Appeals noted that since the decision of the lower Court the Schattman case, which will be commented upon hereafter, had come down; and Congress had amended Title VII of the Equal Employment Opportunity Act to make it applicable to public schools.

The Court held that the rule in question was inherently based upon a classification by sex and was, therefore, arbitrary and unreasonable in its overbreadth. There was a dissenting opinion in this case. In Cohen v. Chesterfield County School Board,[8] decided by the United States District Court for the Eastern District of Virginia on May 17, 1971, aff'd by the Fourth Circuit Court of Appeals on September 14, 1972, it was contended that a regulation of the Chesterfield County School Board which required pregnant school teachers to take a leave of absence at the end of the fifth month of pregnancy violated the constitutional rights of the plaintiff in that it discriminated against her as a woman, thereby violating the equal protection clause of the Fourteenth Amendment. Said the Court:

> "The unrefuted medical evidence is that there is no medical reason for the Board's regulation. As a matter of fact, pregnant women are more likely to be incapacitated in the early stages of pregnancy than the last four months. Further, there is no psychological reason for a pregnant teacher to be forced to take a mandatory leave of absence. In short, since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor."

In conclusion the Court held that:

> "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and

therefore is violative of the equal protection clause of the Fourteenth Amendment."

In Jinks v. Mays,[9] the United States District Court for the Northern District of Georgia, on September 23, 1971, affirmed in part by the U.S. Circuit Court of Appeals, Fifth Circuit on July 31, 1972, had occasion to consider a complaint attacking the policy of the Atlanta Board of Education which granted maternity leave to tenured teachers but denied it to untenured teachers. It was alleged that the policy was arbitrary and violated the Equal Protection Clause of the Fourteenth Amendment.

The Court upheld the argument saying:

"The Court finds that the policy denying maternity leave to untenured teachers is arbitrary. It has no rational basis and bears no relevance to the purpose of the Teacher Tenure Act or to the purpose of the administrative scheme of the Board of Education. Just as defendants grant study leave, bereavement leave, personal illness leave, emergency leave, and military service leave to both tenured and untenured teachers, so, too, must they grant maternity leave to both tenured and untenured teachers."

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"For the foregoing reasons the court declares that defendants' arbitrary policy denying maternity leave to untenured teachers violates the Equal Protection Clause of the Fourteenth Amendment and is null and void. The court orders that defendants be and they are hereby permanently enjoined from refusing to grant maternity leave to plaintiff and the class she represents. The court further orders that defendants are enjoined from refusing to re-employ plaintiff Jinks as a teacher should she choose to resume teaching, on condition that there is at such time a vacancy within the school system. Plaintiff's prayer for back pay is denied."

On September 28, 1971, in the case of Awadallah v. New Milford Board of Education[10] a Consent Order was entered on a complaint filed with the New Jersey Division of Civil Rights providing that the respondents shall not discriminate against any person in violation of the Law Against Discrimination, that the respondents shall not maintain or enforce any policy or practice for the removal of any tenured or non-tenured teacher from her teaching duties that is based solely on the fact of pregnancy or a specific number of months of pregnancy.

The Order further provided that all tenured or non-tenured pregnant teachers may apply to the Board for a leave of absence without pay and shall be granted that leave at any time before the expected birth and continuing to a specific date after birth. The date of return shall be further extended for an additional reasonable period of time at the teacher's request for reasons associated with the pregnancy or birth or for other proper cause. However, the Board of Education need not extend the leave of absence of a non-tenured teacher beyond the end of the contract school year in which that leave is obtained.

In Nancy S. Miller and James H. Blair, Director, Division on Civil Rights v. Pequannock Township Board of Education et al,[11] the Director of the Division of Civil Rights entered an Order declaring a policy of the Pequannock Township Board of Education requiring all teachers, tenured and non-tenured, to

cease working at a specific month in their pregnancy to be in violation of N.J.S.A. 10:5-12(a) as amended by P.L. 1970 Ch. 80. He ordered the board to grant to pregnant teachers a leave to be effective at a date requested by such teachers and to permit such teachers to return at the times designated by them. He further ordered the board to extend such leaves when requested or to reduce them. The order further provides that if a tenured teacher wishes to extend her leave beyond the year in which it commences she shall be permitted to do so. In connection with tenured teachers the order provides that if such a teacher wishes to extend such a leave to return at the beginning of any of the three school years following the school year in which her leave commences, the board shall permit her to do so. That order is now on appeal.

In the matter of appeal of Anne Blumberg[12] an attack was lodged before the Commissioner of Education of the State of New York against a policy which provided that maternity leaves would be granted for no less than one year, no more than two years and in general will be terminated at the beginning of a term (first or second semester) at the discretion of the superintendent. Said the Commissioner:

> "Boards of education admittedly have a primary obligation to provide uninterrupted instruction for their students. If this fundamental duty can be reconciled with the desire of an individual teacher to return to the classroom following the birth of her child, boards of education should make every effort to achieve this accommodation, rather than relying upon the rigid application of a local regulation, which, as has been indicated may lead to inequitable results.

"It should be evident that these remarks are not offered as a condemnation of any policy or regulation involving maternity leaves but rather as a suggestion that such policies and regulations should be administered with reasonable flexibility. When a board of education is aware of a teacher's wish to return to teaching at the beginning of a new term or school year, it might reasonably require her to submit a statement from her physician attesting to her physical ability to resume her duties. This information could be obtained well in advance of the teacher's anticipated return to school in order to allow the board ample opportunity to obtain a replacement should the teacher's physician indicate the inadvisability of his patient's return to the classroom at that time. Such a procedure could effectively reconcile the interests and desires of the teacher with the responsibilities of the board of education to provide uninterrupted instruction for its students.

"Upon consideration of the record before me in this case, I find that while respondent's maternity leave policy, as incorporated in the collectively negotiated agreement with its teachers, appears to be unduly rigid, there has been no abrogation of any constitutionally protected right of petitioner, and that there is no basis upon which I may properly set aside the maternity leave provision of the agreement."

In Guelich v. Mounds View Independent Public School District No. 621[13] decided on November 24, 1971, the United States District Court, District of Minnesota, Third Division, ruled that a federal trial court had jurisdiction to entertain an action by a public school employee seeking a declaration that an administrative policy of the school relative to compulsory maternity leave was a denial of equal protection and requesting damages and injunctive relief.

In Cerra v. East Stroudsburg Area School District[14] the Pennsylvania Commonwealth Court on December 21, 1971, upheld a regulation which required a resignation at the end of the

fifth month of pregnancy. The Court held that the regulation was reasonable, based on experience indicating that a good management of the school system required such resignations in order to avoid a critical shortage of teachers since pregnant teachers granted maternity leave often failed to return. The Court, in its decision, relied on a decision by the Pennsylvania Supreme Court in the Brown case[15] decided in 1943 and upon Ambridge Borough School District's Board of School Directors v. Snyder[16] decided in 1942. It brushed aside the Cohen decision[17] in view of the decisions of the Pennsylvania Supreme Court.

There were two dissenting opinions in this case, one of which expressed the view that the regulation violated the Fourteenth Amendment by denying equal protection of the laws.

In Guelich v. Mounds View Independent Public School District No. 621[18] the United States District Court, District of Minnesota, Third Division held that a claim for damages under the Civil Rights Act[19] could not be entertained since a board of education is not a person within the meaning of that law.

On February 18, 1972, the Michigan Attorney General rendered an Opinion holding that the rules governing eligibility for unemployment insurance benefits that deprive a pregnant woman of eligibility to receive benefits during the period that begins with the tenth calendar week before expected confinement and extending through the sixth calendar week following

termination of pregnancy are invalid because they discriminate against females on the basis of a physical condition unique to that sex and are in violation of the equal protection clause of the Federal Constitution. Subjecting pregnant and post-pregnant women to more stringent eligibility requirements than are applied to similarly temporarily disabled men is patently discriminatory.

Schattman v. Texas Employment Commission,[20] decided on March 1, 1972 (amended March 17), reversed a lower United States District Court decision[21] and upheld a policy of terminating pregnant female employees two months prior to the expected delivery date. It had been alleged that the policy violated the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The District Court so ruled.

The Circuit Court of Appeals held that a state or political subdivision was not subject to the provisions of the Civil Rights Act of 1964. It further held that there was no violation of any constitutional rights and that the regulation was not unreasonable or arbitrary. It is interesting to note at this point that the amendments to the Civil Rights Act of 1972, mentioned at the start of this talk, were signed into law on March 24, 1972.

In Williams v. San Francisco Unified School District,[22] the United States District Court for the Northern District of California held, on March 21, 1972, that a policy which required

pregnant employees to take a leave at least two months before the anticipated delivery date was violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution because it singled out pregnant certified employees for classification without any rational relationship to any legitimate objective of the school district and, in addition, promoted no compelling interest of the district or the state. The employee was entitled to a preliminary injunction where, apart from the court's belief of the probability of her ultimate success on the merits of the case, she had sustained her burden of showing that on the basis of the record, the balance of hardships tipped decidedly in her favor.

In Connecticut, the Commission on Human Rights and Opportunities in the case of Staten v. East Hartford Board of Education[23] held on March 28, 1972 that a city board of education discriminated against a female school teacher on the basis of sex by requiring her to take maternity leave without pay from the fifth month of pregnancy up to and including the third month following the termination of pregnancy. By virtue of its policy, the board of education only requires such leaves of women. Women are terminated not because of their willingness to continue work, their job performance, or their need for personal medical safety, but solely because of a condition attendant to their sex. The special treatment with regard to maternity was based on sex within the meaning of the state law banning such discrimination.

In Monell v. Department of Social Services of the City of New York[24] Judge Constance Baker Motley ruled on April 12, 1972 that a federal trial court had subject matter jurisdiction of an action challenging the validity of a policy requiring pregnant women employees to take unpaid leaves of absence after the seventh month of pregnancy. The action had been instituted by female employees of the New York City Board of Education and the New York City Department of Social Services.

Said Judge Motley:

> "Discrimination against women in employment generally is now prohibited by national law. 42 U.S.C. Para. 2000e. Discrimination against pregnant women employees and in the application of disability benefits to pregnancies has recently been prohibited by the Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed. Reg. 6837. An equal rights amendment to the Federal Constitution is making its way through the ratification process of the states. Sex legislation is thus automatically suspect. Reed v. Reed, supra."

She held that the complaint could not be dismissed for failure to state a claim upon which relief may be granted.

On the same day that Judge Motley decided the Monell case, she decided the first case on record that I have been able to find dealing with an application by a male for leave under a maternity leave policy. Lest anyone conjure up any vision of a pregnant male about ready to disgorge a child, rest easily. Such was not the case.

In Danielson v. Board of Higher Education, et al,[25] Judge Motley passed upon a challenge by one Ross Danielson, a lecturer in sociology of the City University of New York, of a pregnancy leave policy in effect at the City University. Mr. Danielson claimed that women faculty members were permitted to take leaves of absence up to three semesters, for the purpose, among others, of caring for a newborn infant, without adversely affecting their tenure rights, but the same child care privilege was denied to men. He sought a declaration that the maternity leave provision was unconstitutional on its face and as applied to male faculty members. He sought an injunction enjoining the defendants from discharging him or otherwise penalizing him for having taken child care leave.

Mr. Danielson's wife was a teacher at Lehman College. When she learned of her pregnancy it was decided that she would continue her teaching duties throughout her pregnancy and after childbirth. For the first six months after the child was born, Mr. Danielson would stay home and rear the infant.

He attempted to obtain a "parental leave of absence" which leave, it was contended, was available for women faculty members. His request for leave was rejected.

Judge Motley ruled that the complaint could not be dismissed for failure to state a claim upon which relief may be granted.

On Sunday, September 24, 1972, the New York Times reported in a page 1 story that prospective fathers would receive paternity leaves under a pioneer contract proposed by the City University of New York to its professional staff. The proposals included up to 20 days of paid leave and up to 18 months of unpaid leave for both men and women. Apparently, the decision of Judge Motley in the Danielson case bore fruit.

In Allison v. Board of Education Union Free School District No. 22[26] it was held that an action brought by a public school teacher seeking compensatory damages on the ground that she was unlawfully discriminated against on account of her sex in being placed on an unpaid maternity leave must be dismissed because she had earlier elected to take her charges to the State Human Rights Agency which had the authority to award damages. Since the question of damages as well as the alleged act of discrimination should have been before the court in the same proceedings, there was no basis for splitting off the request for declaratory relief.

In Antonopoulou v. Beame,[27] a grievance award of back pay to a female college lecturer for earnings lost from the date she requested, but was refused, termination of maternity leave to the date she was offered reinstatement could not be enforced since the award amounted to a gift of public funds for services not rendered.

In Heath v. Westerville Board of Education,[28] it was held that a board of education violated an 1871 law by discharging

a non-tenured teacher with less than three years of service under an existing maternity leave policy because she had entered her sixth month of pregnancy. The policy was held to deny pregnant women equal protection of the laws under the Fourteenth Amendment because it treated pregnancy different from other medical disabilities. The Court also held that an attempt to distinguish in terms of maternity leave policy between the untenured pregnant teacher of more than three years' service and those of less than three years' service was arbitrary and unlawful.

In Pocklington v. Duval County School Board, et al,[29] it was held that in the absence of any medical justification for a maternity leave policy requiring a leave of absence by pregnant female teachers after four and one-half months of pregnancy, a preliminary injunction requiring the authorities to permit a teacher on leave to resume her teaching duties would be made final and the school assessed for back wages representing the amount of earnings lost due to the policy. It was further held that the pregnant teacher was denied equal protection of the laws and denied due process of law by the application of the policy without an opportunity to establish her medical fitness to continue teaching.

In Bravo v. Board of Education of City of Chicago, et al,[30] it was also held that a policy requiring pregnant female teachers to take fixed periods of maternity leaves denied the equal protection of the laws and the policy made an

invalid distinction in regard to sick pay, seniority and other employment benefits as between teachers on maternity leave and those on leave for illness. The Court ordered the board to treat maternity leaves as leaves due to illness under the board's rules.

It is quite obvious from a consideration of the foregoing cases that the subject of sex discrimination is one that will continue to bear watching for a long period of time!

NOTE: References hereafter to E.P.D. are to Employment Practices Decisions published by Commerce Clearing House (C.C.H.)

1. P.L. 88-352; 42 U.S.C. Sec. 2000 et seq.

2. P.L. 92-261; 86 Stat. 103

3. Sec. 701 (a)

4. Sec. 701 (b)

5. Sec. 702

6. 326 F. Supp. 1208; 3 E.P.D. Par. 8228 (C.C.H.)

7. ---F 2d.---4 E.P.D. Par. 7921 (C.C.H.)

8. 326 F. Supp. 1159; 3 E.P.D. Par. 8231 (C.C.H.)
Aff'd ---f. 2nd---5 E.P.D. Par. 7967 (C.C.H.)

9. 332 F. Supp. 254; 4 E.P.D. Par. 7684 (C.C.H.)
Aff'd in Part and remanded in Part ---Frd. ---;
4 E.P.D. Par. 7922 (C.C.H.)

10. N.J. Division of Civil Rights, Docket No. E02ES-5337

11. N.J. Division of Civil Rights, Docket No. E14ES-5422

12. Decision No. 8353, N.Y. Commissioner of Education, Sept. 24, 1971

13. 4 E.P.D. Par. 7735 (C.C.H.)

14. 285 A.2d.206; 4 E.P.D. Par. 7607 (C.C.H.)

15. 32 A.2d.565; (1943)

16. 29 A.2d.34; (1942)

17. See Footnote 8, Ante.

18. 4 E.P.D. Par. 7625 (C.C.H.)

19. 42 U.S.C. Sec. 1983

20. 40 U.S. Law Week 2614; 459 F.2d.32 4 E.P.D. Par. 7679 (C.C.H.) Rehearing Denied 4 E.P.D. Par. 7864

21. 330 F. Supp. 328

22. 4 E.P.D. Par. 7771 (C.C.H.)

23. Case No. FEP-6-34-1; EP Guide Par. 5055 (C.C.H.)

24. 4 E.P.D. Par. 7765 (C.C.H.)

25. 4 E.P.D. Par. 7773 (C.C.H.)

26. 4 E.P.D. Par. 7840 (N.Y. Sup. Ct. Nassau Co., 5/18/72)

27. 4 E.P.D. Par. 7887 (N.Y. Sup. Ct., App. Div., 5/18/72)

28. 5 E.P.D. Par. 7951 (U.S.D.C.S.D. Ohio, Eastern Division, 6/28/72)

29. 5 E.P.D. Par. 7937 (U.S.D.C.M.D. Fla., Jacksonville Div., 6/13/72)

30. 5 E.P.D. Par. 7941 (U.S.D.C.N.D. Ill., Eastern Div., 7/7/72)

Comments

STEPHEN G. WEISS, ESQ.

Stephen G. Weiss is a graduate of Rutgers University and the Rutgers University School of Law. A former Assistant Attorney General of the State of New Jersey, Mr. Weiss is engaged in the practice of law as a partner in the East Orange firm of Greenwood, Weiss and Shain. A member of the New Jersey State Bar Association and the New Jersey Association of School Attorneys, he has served as a Hearing Examiner for the Division on Civil Rights in Miller v. Pequannock Board of Education (maternity leave sex discrimination case).

Ladies and gentlemen, it is a pleasure to be able to participate in this School Law Forum, especially as a co-participant with Irving Evers, Esq. Irv has comprehensively reviewed the variety of decisions, both state and federal regarding sex discrimination in general, and maternity leave problems in particular.

I would like to devote my attention specifically to the decision of the Director of the Division on Civil Rights in the case of Miller v. Pequannock Board of Education. This case, which is presently on appeal to the Appellate Division, should result in some final word with respect to the eventual duties and obligations of New Jersey school boards in the maternity leave area.

Having served as Hearing Officer in the Miller case I am, of course, quite interested in the final outcome of the matter. The Miller case was one of three consolidated school board sex

discrimination complaints. The other two, involving New Milford and Bloomfield, were settled by consent order. As an aside, the Civil Rights Division informed me that during the past three or four years there have been in the neighborhood of 25 to 30 complaints against boards of education for discrimination generally. Most involved allegations of racial discrimination, although additional charges of sex discrimination were occasionally raised.

Before getting into the details of the Director's order in the Miller case, I thought it might be interesting to explore some other potential areas involving sex discrimination in school board employment. For example, it is conceivable that complaints might be filed involving the area of curriculum and financing where the emphasis, it might be charged, is placed upon male-oriented course offering and the allocation of fiscal resources channeled primarily into those areas. Another offshoot of this particular subject could be a challenge that females are encouraged and counseled into non-academic areas such as business, commercial and home economics courses.

Another potential area of complaint could involve charges respecting promotion to supervisory positions such as directorships and department chairmanships. Here, although I am again simply hypothesizing, it could be charged that the selection process is sometimes weighted against female applicants.

Another area, which is the subject of a separate presentation, involves discrimination in interscholastic and intramural sports. There have been some recent cases in this area, and I will leave their discussion to the panel participants who have been asked to speak on this topic.

A tangential area which does not technically involve sex discrimination but could be incompassed under a very broad category of sex considerations involves the topic of homosexuality or promiscuity. I can conceive of cases wherein a school employee might allege that he or she has not been reemployed or advanced in employment because of their particular sexual preferences or their own private conduct. The decision of the Commissioner of Education in the Grossman case might fall in this particular area.

In any event, the major emphasis regarding sex discrimination by school boards has been placed upon the maternity leave provisions to be found in most board policies or in negotiated agreements. A board of education may find itself having to defend in any one of a number of forums in respect to its maternity leave rules. Cases have been commenced in both the state and federal courts as well as before administrative agencies against school boards or other public employers challenging particular maternity leave provisions. The choice of forum also gives rise to the question of proper jurisdiction. In the Miller case both the respondent board of education and the New Jersey School Boards Association argued

that the challenge to the Pequannock maternity leave provisions should first be heard before the Commissioner of Education since it primarily concerned the question of educational policy. I recommended to the Director, and he agreed in his findings, that although the Commissioner of Education had often been called upon to determine school law controversies surrounding maternity leaves, the contention that such leaves violate the Law Against Discrimination made the case a proper one for exercise of jurisdiction by the Division on Civil Rights. Given the developing law in the area, I do not believe that the educational expertise which is presumed to exist in the Department of Education necessarily precludes a hearing and decision before the Director of the Division on Civil Rights.

Irv Evers mentioned, and I would like to further detail, some of the specifics of the Director's order in the Miller case and some problems which could arise as a result. In the first instance, the Director ordered that boards could not discharge or terminate from employment any non-tenured teacher simply because of her pregnancy. He found that they, too, were entitled to a leave of absence for this reason, although he carefully articulated the board's right to have the leave of absence terminate automatically upon the completion of the contract year unless the board determined to extend the leave.

The Director also prohibited boards from removing non-tenured teachers from their "regular teaching duties" during

pregnancy occurring in a school year for which she had signed a contract of appointment. I would like to raise with this group the question of how "regular teaching duties" should be defined and suggest that it might leave some flexibility in boards to remove a teacher from a particular classroom teaching situation.

The Director then listed specific reasons permitting removal from teaching duties, all of which raise some problems. He first determined that a teacher could be removed if her performance has "substantially declined." It appears to me that this is a highly subjective criterion which leaves room for maneuver by boards of education. A second reason listed by the Director was "physical incapacity", which he defined as a condition whereby the teacher's "health would be impaired if she were to continue teaching." Here again, the inquiry is a rather subjective one, although the room for maneuver was limited by certain conditions set down by the Director prior to the board's making such a determination. Firstly, the board would be precluded from acting if the teacher produced a certificate from her physician that she was "medically able" to continue teaching. Secondly, even if the teacher's own physician did not feel that she was "medically able", the board's physician could apparently arrive at a contrary conclusion. (This situation seems to be a rather unlikely one.) If the teacher's own physician and the board's physician disagree as to her capacity to perform teaching duties, then the

board has to request expert consultation from an impartial third physician appointed by the County Medical Society. The Director's order in the Miller case stated that the third medical opinion would be conclusive and binding. Finally, the Director added that a teacher could, of course, be removed for "just cause" as defined in Title 18A. I would suggest that the reasons listed in Title 18A for removal from the classroom have been limited by the Director's order since inefficiency and incapacity stemming from a condition of pregnancy are now subject to the particular procedures described by the Director in the Miller case.

Another critical area of the Director's decision concerned the cutoff date for employment and return to teaching. He stated in his order that a teacher's maternity leave could be applied for "at any time prior to birth." The application would have to specify the date upon which the requested leave is to commence and the month during which the teacher wishes to return. This leave request, said the Director, "shall be granted by the board." Extensions or reductions of the time period would be allowed within the discretion of the board, at the teacher's request, provided the extension or reduction did not substantially interfere with the administration of the school. If a tenure teacher has given notice that she wishes to return to teaching within the school year in which the leave commences, and then later requests an extension beyond the school year, she "shall be permitted to do so if

she makes application at least three weeks prior to the announced date of commencement of leave and subject only to the provisions of the next subparagraph." The next subparagraph respecting leave terminating subsequent to the school year requires that the board must permit a teacher to return to employment "at the beginning of any of the three school years following the school year in which her leave commences." This presents certain problems which Irv Evers mentioned in his presentation.

With respect to a return to school other than at the beginning of the school year, the Director would permit boards to prohibit the same if the board concludes that such return "would substantially interfere with the administration of the school." Here again, we have a rather subjective criterion which could present problems in particular cases.

As you can see, there are a variety of circumstances which can lead to further disputes and/or litigation. The elimination of the arbitrary cutoff date prior to birth and the elimination of arbitrary time periods after birth was and is just one aspect of the total problem.

By way of conclusion, I would simply stress again the need for boards of education to alert themselves to the variety of areas in which sex discrimination could be charged. I entertain no doubt that the coming years will see an increase in sex discrimination cases, and I hope that we as school

attorneys will be able to lend our assistance in guiding boards through the very large gray area which exists between the need to honor individual rights and the need to protect the administration of a school system from undue interference.

IV

The Law of Non-Tenure Teacher Dismissal

PETER R. KNIPE, ESQ.

Peter R. Knipe is a graduate of Yale College and Yale Law School. A partner in the firm of Cook and Knipe, Princeton, New Jersey, Mr. Knipe has participated with Thomas P. Cook, Esq. in Federal District Court and New Jersey State Court cases involving the issue of the non-renewal of non-tenured teachers. In addition to serving as counsel to several school districts in the state, his firm also acts as special counsel to the New Jersey School Boards Association. Mr. Knipe is a member of the Bar in Oregon, New York and New Jersey.

This is one of the few areas of the law in which a four letter word provides both an accurate and an appropriate response to the question "what is new in the field." The word is Roth. On June 29, 1972, the United States Supreme Court handed down the long-awaited decisions in the Roth[1] and Sindermann[2] cases.

Prior to the decisions in these two cases, the Federal Circuits were hopelessly split as to the procedural due process requirements involved in the non-renewal of non-tenured teachers. I would like to emphasize the fact that the question being considered in these cases was whether a board of education, deciding not to renew the employment contract of a teacher not under tenure, was obligated to provide the teacher with a written statement of the reasons for the board's decision, and, if so, whether the board was also required to grant the teacher a hearing with respect to those reasons. In other words, the cases were solely concerned with the procedures to be followed

at the board level and not at any other or later stage of the proceedings. Additionally, I should point out that in this discussion, I shall be dealing with non-renewal cases as opposed to true "dismissal" or "termination" cases involving the cessation of employment during an academic year.

As I previously stated, prior to the decisions in Roth and Sindermann, the Federal Circuits were divided as to the due process requirements.[3] Several circuits, such as the Sixth,[4] Eighth and Tenth[5] Circuits had held that it was not necessary to provide either a statement of reasons or a hearing to a non-tenured teacher whose contract was not being renewed. Other circuits, such as the Seventh[6] Circuit, from which Roth had come, had held that it was necessary to give both a statement of reasons and a hearing, and the First Circuit in the Drown[7] case tried to take an intermediate position requiring a statement of reasons but not a hearing.

In short, the Federal Courts of Appeals, as well as the Federal District Courts, were hopelessly split.

Although the Federal Courts were divided prior to the decisions in Roth and Sindermann, the State Department of Education and the New Jersey State Courts had consistently held that non-tenured teachers had no legal right to a renewal of a teaching contract, or to a statement or explanation of the reasons for non-renewal, or to a hearing as to the reasonableness of reasons for non-renewal, absent a showing of unconsti-

tutional discrimination.[8] Needless to say, this position had been attacked at all levels, and the most important recent decision in the New Jersey State Courts was that reached in Donaldson v. North Wildwood,[9] which was decided by the Appellate Division of the Superior Court of New Jersey on June 22, 1971.

The Donaldson case is currently pending before the State Supreme Court, and although we already have filed briefs in the case, including a brief outlining our interpretation of the impact of the Roth and Sindermann decisions, Mr. Cook has informed me that so far, no date for oral argument has been set by the Court. Thus, at this time, pending a decision by the Supreme Court of the State, the law in New Jersey is as propounded by the Appellate Division in Donaldson.

Meanwhile, back in the Federal District Court of New Jersey, at least two cases, one involving non-renewal and another involving termination, are pending in Camden. In the case involving the Glassboro Board of Education,[10] which is a non-renewal case, both parties have filed motions for summary judgment, and they are awaiting the scheduling of a time for oral argument. The other case involving the Oaklyn Board of Education[11] is awaiting trial.

Because of the very brief amount of time allotted, I think that I can best use this time by discussing the Roth and Sindermann decisions, outlining our interpretation of these

decisions and then briefly discussing some of the problem areas and questions that remain and that we expect to be answered by the State Supreme Court in Donaldson.

Before proceeding to discuss the cases, I would like to say a few words about the magnitude of the problem that is involved. In August of this year, the Special Services Department of the New Jersey School Boards Association conducted a research survey in an effort to assist us in determining the number of non-renewals that may take place annually in New Jersey. Using a random sampling method and surveying 32 of 581 operating school districts which included approximately 11% of New Jersey's 93,071 teachers and administrators, the survey produced some interesting and moderately startling results. Although I do not have the time to go into a detailed discussion of the method of sampling and other particulars of the survey, I would like to refer to one sentence of the cover letter from Bob Martinez in which he states that "...there is evidence to support a conservative estimate of 4,000 formal non-renewals per year in the State of New Jersey."[12]

I do not think that I need to emphasize to any of you that have been through protracted dismissal proceedings, the tremendous consumption of time, energy and funds involved. Naturally, any type of statistics cannot begin to measure the potential disruptions and dislocations that might result if every non-renewal required a statement of reasons and a hearing at the board level. Additionally, I am sure that you can all

imagine the potential for harassment that would be available in those situations in which changing enrollment or district lines had required a substantial staff reduction. In short, we are talking about a problem of major proportions and substantial impact on school boards, taxpayers, teachers and ultimately school children.

Proceeding to the Roth and Sindermann cases, the Roth decision confirms the position that nothing in the U.S. Constitution requires a board of education in states like New Jersey to give the non-tenured teacher, whose contract is not being renewed, a statement of reasons for such non-renewal or a hearing.

The Sindermann case, on the other hand, does not apply to non-tenured teachers in New Jersey because it deals with a teacher who allegedly had de facto tenure as a result of policies and practices of the institution employing him. There can be no such de facto tenure under the school laws of this state.

As emphasized in the concurring opinion of Chief Justice Burger in both cases, it is state law that determines whether a teacher has any right to re-employment that is entitled to due process protection. New Jersey law has consistently denied such right to probationary teachers, thus preserving a clear distinction between tenure and non-tenure. The decisions in Roth and Perry have thus removed federal "due

process" from the New Jersey scene in non-tenured and non-renewal cases.

I think that it might be helpful to discuss in some detail the facts and conclusions in both Roth and Sindermann.

The plaintiff in the Roth case was appointed to his first job as an assistant professor at Wisconsin State University for a fixed term of one academic year. While completing that term, he was duly informed that he would not be rehired for the next academic year. Under Wisconsin statutory law, a state university teacher could acquire tenure only after four years of year-to-year employment.[13] Until he had acquired tenure, the teacher was entitled to nothing more than his one year appointment. Furthermore, nothing in the Wisconsin law required that the employee be given a reason for non-retention, and no review or appeal was provided in such cases.[14] Accordingly, when the president of the University notified Roth of the non-renewal, he gave no reason for the decision and no opportunity for a hearing.

Roth then brought suit in the Federal District Court, attacking the University's decision on two grounds: first, that the true reason for the decision was to punish him for certain statements critical of the University administration, thus violating his right to freedom of speech; and secondly, that the failure to provide him with a statement of reasons for non-retention or a hearing violated his right to procedural

due process of law. The District Court granted summary judgment for the plaintiff on the procedural issue, ordering the University officials to provide him with reasons and a hearing, and the Court of Appeals, with one judge dissenting, affirmed. The only question presented on the appeal to the United States Supreme Court was that of due process. On that issue, the Supreme Court held that the teacher had no constitutional right to a statement of reasons and a hearing on the University's decision not to rehire.

The majority opinion by Mr. Justice Stewart began with the premise that procedural due process applies only to the deprivation of interests encompassed with the Fourteenth Amendment's protection of "liberty" or "property."

With respect to liberty, the Court observed that in the ordinary case, mere non-renewal does not deprive a person of that constitutional right and mere proof that non-retention might make a person somewhat less attractive to other employers "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty'."[15] The Court acknowledged that there might be cases in which a state refused to re-employ a person under such circumstances that interests in liberty would be implicated, such as making a charge against the employee that he had been guilty of dishonesty or immorality, which charge might damage his standing and associations in the community. In such a case, the employer should afford notice and a hearing to provide the person an opportunity to

clear his name. However, even in such an extreme case, once the person had cleared his name at a hearing, his employer would remain free to deny him employment for other reasons.[16] While admitting that an extreme case requiring a statement of reasons might arise, the Court emphasized the fact that in the present case:

> "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." [17]

On the question of "property" rights, the Court emphasized the requirement of looking to state law and concluded that under Wisconsin law, although the teacher had "an abstract concern" in being rehired, he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract. Neither the terms of the appointment, nor any state statute or University rule or policy, created any legitimate claim or entitlement to re-employment.

The Sindermann case involved the issues of free speech and procedural due process. The Supreme Court disposed of the free speech issue by holding that the lack of a contractual or tenure right was immaterial to that portion of the claim. As to the existence of a constitutionally protected interest in re-employment, the Court held that under the allegations of the complaint, the plaintiff might possess an interest which, though not secured by formal tenure, "was secured by a no less

binding understanding fostered by the college administration." Thus, the Court, employing theories of implied contract and reliance, found that the plaintiff might be able to show that he had de facto tenure.

The Supreme Court did not determine that the plaintiff had a legitimate claim to job tenure, but only held that summary judgment should not have been granted for the Regents because the plaintiff might be able to show from the circumstances surrounding his years of service that he had the equivalent of tenure through a "mutually explicit understanding" or an "unwritten common law" under which a tenure system may have been created "in practice."

The Court stressed the point that local law would determine the nature of plaintiff's interest.

In his concurring opinion, Chief Justice Burger underscored the point that "the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law"; and he emphasized that local law would determine the existence of an interest in re-employment of sufficient stature to warrant due process protection. Thus, both Roth and Sindermann direct our attention back to state law.

The Appellate Courts of New Jersey have repeatedly made it clear that unlike the Texas college system involved in Sindermann, New Jersey school districts cannot give tenure

rights by contract, express or implied. Tenure is a legislative status,[18] not a contractual one, and is acquired after the mandated period of employment.[19]

Consequently, in New Jersey, school teachers cannot acquire de facto tenure by informal understandings or "unwritten common law." In the case of staff members employed on a calendar year basis, although N.J.S. 18A:18-5 does permit the employing board to shorten the period of probation, this must be accomplished by a board resolution adopting a uniform policy for all staff members similarly situated; it may not be done by contract with an individual employee.[20]

At this point some of you may be tempted to ask what is left to be argued in the Donaldson case if we are correct in our interpretation of Roth and Sindermann and the status of the law in New Jersey is as enunciated in the case of Zimmerman v. Board of Education of Newark,[21] the Appellate Division decision in Donaldson and numerous Commissioner's decisions.

The controversy in Donaldson continues because the appellant, in addition to her main constitutional argument, is in effect asking that the Court require a statement of reasons and a hearing as a matter of policy pursuant to its power of review under the New Jersey Constitution. Thus, it can be argued that the disposition of the constitutional question by the United States Supreme Court does not preclude the courts of New Jersey from requiring a statement of reasons for non-renewal

as a matter of state administrative law. Despite various "balancing" arguments, the main argument for such a judicially made administrative decision would seem to rely on the decision in the case of Monks v. New Jersey State Parole Board,[22] which involved the review by the Supreme Court of New Jersey of the Parole Board's refusal to give a statement of reasons for the denial of parole to Monks. The argument is that the State Constitution provides a basis for the review of actions of administrative and other agencies and a remedy in the event that the Court should determine that any of the actions were arbitrary or unreasonable.

In Donaldson, we are contending that the Monks case can be readily distinguished. The "property" or "liberty" involved in the two cases is totally different: freedom from incarceration on the one hand as opposed to the right to continue in a specific job in a specific school.

Additionally, we feel that there may be a certain degree of circularity in the "fairness" argument because Monks relied on the Drown decision which was based on the federal constitutional due process argument. Therefore, the first question raised would seem to be whether the court, if it had to decide Monks today, would reach the same decision without the federal constitutional buttress supplied by Drown. We suspect that because of the importance of the issues in Monks, the liberty and freedom of the individual, the Supreme Court would reach the same conclusion.

We do not, however, feel that the "liberty" or "property" rights which might be involved in Donaldson can be equated with those in Monks. Additionally, in response to the appellant's argument in Donaldson that the Supreme Court should require a statement of reasons, we are arguing among other things that such a requirement should not be imposed because the possible benefit to teachers would be far outweighed by the burdens imposed on school boards and courts.

Most boards today give regular observations and evaluations to every probationary teacher and they are reviewed with the teacher, so that if her evaluations are not the best, she at least has an indication as to why her contract is not being renewed.

Additionally, in most cases, if there has been unlawful discrimination, the plaintiff can obtain the necessary evidence thereof, generally through informal conferences with fellow teachers or superiors.

In short, it is our position in Donaldson that the existing law and practice protect teachers from unlawful discrimination and provide ample opportunity for obtaining and proving the facts without creating an insurmountable administrative burden and flooding the courts with frivolous appeals from appropriately reached decisions, which, in the end, will be sustained.

I would hope that by this time next year we will be in a position to report the outcome of the Donaldson case, and

I would also hope that the remaining questions in this area will have been answered. Although the decisions in Roth and Sindermann answered a great many questions, they still left a few options open to the New Jersey Supreme Court and they left some questions unanswered.

Hopefully, in the near future the remaining questions will be answered.

(Editors Note: On the same day that Roth and Sindermann were decided, the U.S. Supreme Court denied review in Orr v. Trinter (see footnote six), which had held that a non-tenure teacher had no right to a statement of reasons for a school board's refusal to renew his employment contract or to a hearing. It likewise denied review in Fooden v. Board of Governors, Illinois (1971) where a state court had held that the probationary teacher's employment could be terminated without furnishing specific reasons for non-retention.

These cases appear to be fully consistent with Roth. There is some question, however, from another action in the Court the same day in vacating judgment in Shirck v. Thomas, 447 F.2d 1025, Seventh Circuit Court of Appeals (1971). This was remanded to the Court of Appeals for further consideration in light of Roth. The Shirck case was a re-affirmation by the Seventh Circuit of its earlier decision in Roth, though indicating that there was no burden of proof which existed upon the Board of Education where a second year non-tenure teacher had been discharged. The teacher had been given reasons for her dismissal that were work-connected. It is understood the Illinois Education Association has filed a memorandum supporting a motion for rebriefing in Shirck alleging that the teacher was deprived of "liberty" by the accusations made in the reasons for her dismissal and also that there has been harm to her reputation. This is of course an effort to bring this non-tenure dismissal, where reasons for such dismissal were given, under the requirement of Roth that there need not be a hearing on the decision not to rehire unless there is proof that such action violates an interest in liberty or property. The thrust of the argument appears to be that while Roth may have foreclosed certain procedural guarantees of due process being challenged, it may have opened the door to allegations of deprivation of substantive due process rights.)

1. Board of Regents v. Roth, _____ U.S. _____, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)

2. Perry v. Sindermann, _____ U.S. _____, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972)

3. ORR v. Trinter, 444 F.2d 128 (C.A. 6th. 1971)

4 Freeman v. Gould, 405 F.2d 1153 (C.A. 8th 1969), cert. denied 396 U.S. 843 (1969)

5. Jones v. Hopper, 410 F.2d 1323 (C.A. 10th 1969) cert. denied 397 U.S. 991 (1970)

6. Roth v. Board of Regents, 446 F.2d 806 (C.A. 7th. 1971)

7. Drown v. Portsmouth School District, 435 F.2d 1182 (C.A. 1st. 1970) cert. denied 402 U.S. 972 (1971)

8. Donaldson v. Board of Education of North Wildwood, 115 N.J. Super. 228, 231 (1971)

9. See footnote 8

10. Leonard LaBattaglia v. Board of Education of Borough of Glassboro, United States District Court for the District of New Jersey, Docket No. 886-71

11. Larissa G. Van Dalen v. Board of Education of Borough of Oaklyn, United States District Court for the District of New Jersey, Docket No. 833-71

12. Letter dated August 28, 1972 from Robert P. Martinez to Peter Knipe. (See letter appended.)

13. Wisconsin Statutes 1967, c. 37.31 (1)

14. The Rules, promulgated by the Board of Regents in 1967, provided:
"RULE I--February 1st is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."
"RULE II--During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case."
"RULE III--'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenured faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or

to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only."
"RULE IV--When a non-tenured faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

15. 33 L.Ed.2d, 559, n.13

16. 33 L.Ed.2d, 558, n.12

17. 33 L.Ed.2d, 560

18. The basic tenure statute, N.J.S. 18A:28-5, provides in part that the services of all teaching staff members who meet the prescribed qualifications

...."shall be under tenure during good behavior and efficiency ***after employment in such district***for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

"(c) the equivalent of more than three academic years within a period of any four consecutive academic years***."

19. Canfield v. Board of Education of Pine Hill, 51 N.J. 400 (1968); Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (1960)

20. Rall v. Board of Education of Bayonne, 54 N.J. 373 (1969)

21. Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962)

22. Monks v. New Jersey State Parole Board, 58 N.J. 238 (1971)

August 28, 1972

Peter R. Knipe, Esq.
Cook and Knipe
245 Nassau Street
Princeton, New Jersey 08540

RE: Donaldson v. North Wildwood Board of Education

Dear Peter:

Pursuant to your request to me of last week, I have asked the Research Division of the School Boards Association to conduct a survey on the numbers of non-tenured professionals whose contracts are not renewed in New Jersey. I am enclosing for your information the results of their work.

These results, in fact, are mildly startling. Whereas the State Department of Education had reported in 1970 that school boards did not renew only between one and five percent of non-tenured teachers, our survey indicates that for the previous year school districts of New Jersey did not renew between 9.2% and 15% of non-tenured employees. This conclusion is based on a survey described in the accompanying report which represents a statistically valid random sampling of 6% of the total number of school districts, and included approximately 11% of New Jersey's teachers and administrators.

It is also interesting to note that of all those teachers who faced non-renewal of their contracts, only 20% resigned voluntarily. While the fact that 80% hung on may be indicative of a certain helplessness on their part because of the glutted job market, or failure to communicate on the part of school administrators, it may also be indicative of a high rate of non-tenure employees whose termination will require formal action on the part of the employer. In this connection, one should note that approximately 45% of certificated personnel in our schools are non-tenure and of those dismissed, the average year of progression in the probationary period was 1.38.

Finally, I think it significant to note that based upon our figures of certificated personnel population and the conservative estimates of the number of non-tenure employee terminations which will require formal board action, there is evidence to support a conservative estimate of 4,000 formal non-renewals per year in the State of New Jersey. This would mean at least four and probably more hearings for each board of education if the Court were to mandate that procedure assuming that we only count those boards which are in an operating capacity.

Very truly yours,

Robert P. Martinez,
General Counsel

V

Drafting a Management Grievance Clause

GERALD L. DORF, ESQ.

Gerald L. Dorf is a graduate of the Cornell University School of Industrial and Labor Relations and the Loyola University School of Law. Engaged in the general practice of law in Newark, New Jersey, Mr. Dorf has served as labor relations counsel to numerous school boards, municipalities, county agencies and private sector employers. A member of the New Jersey, Federal and American Bar Associations, he has lectured widely on the subject of collective bargaining and has authored several articles on this topic.

One of the most critical areas of any labor-management agreement is the grievance procedure. Indeed, there are those who consider this area to be the "heart" of the agreement between the parties. From the union or association viewpoint, the grievance procedure is essential to prevent or inhibit alleged arbitrary and capricious actions being taken on the part of management. From management's viewpoint, the grievance procedure can serve a useful function in that such a procedure provides a useful and legitimate channel for airing employee grievances. The result can, hopefully, have a cathartic effect. However, misuse of the grievance procedure often subjects management to delay, inefficiency and harrassment.

NEGOTIABILITY

Should management in the public sector, and more particularly a school board, agree to the inclusion of a grievance

procedure within a negotiated labor agreement? Aside from the importance which the teachers' association attaches to such a procedure and the inherent benefits that management can gain, the New Jersey State Legislature in its wisdom has determined that a public employer must negotiate a grievance procedure with the majority representative of his employees and that such a procedure must be included in a written agreement between the parties. The public employer may agree that the terminal step of such a procedure be binding arbitration. The precise language of Chapter 303 in this regard at N.J.S.A. 34:13A-5.3 is as follows:

> "...Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes."

The two most critical areas of a grievance procedure are the alpha and the omega. That is, what is grievable and what is the terminal step of the grievance procedure. What goes in between those two sections, while relevant and of some degree of importance, is not nearly as critical to a school board as the determination of what areas are subject to the grievance procedure and the final step in such resolution.

DEFINITION OF GRIEVANCE

Quite naturally, the association will seek the broadest possible definition of a grievance. There is, however, in my view, a vast difference between a legitimate grievance cognizable under the terms of a collective bargaining agreement and a mere complaint by an employee of a school board that in some fashion he is unsatisfied with the treatment that he has received. In short, every complaint by an employee is not, and should not, be subject to the grievance procedure. Since generally speaking the collective bargaining agreement sets forth the essential terms of agreement between the parties, the definition of the alleged grievance should be limited to an alleged violation or misapplication of the agreement. The complete definition of a grievance from an actual teachers agreement is as follows:

> "The term grievance is any alleged violation of this Agreement or any dispute with respect to its meaning or application."

In addition to the foregoing, in view of the fact that certain substantive rights flow to teachers or from Title 18A, a number of school board attorneys have found it desirable to state in the labor agreement that certain "areas" are not subject to the grievance procedure. It is clear that the Commissioner of Education has carved out for his office certain areas of responsibility in terms of board-employee disputes resolution. Such areas should, therefore, not be

subject to a grievance procedure since doing so would in effect, give the employee "two bites of the apple." That is, an employee who was allegedly aggrieved should not have the opportunity of pursuing his grievance to either the terminal step of the grievance procedure in the agreement between the parties and/or to the Commissioner of Education; and thereby, require the board to run the gauntlet twice.

It is recommended that the following additional exclusions from the grievance procedure be considered:

1. The failure or refusal of the board to renew a contract of a non-tenure employee.

2. In matters where a method of review is prescribed by law, or by any rule, regulation, or by law of the State Commissioner of Education or the State Board of Education.

3. In matters where the board is without authority to act.

4. In matters involving the sole and unlimited discretion of the board.

5. In matters where the discretion of the board may not be unlimited but where, after the exercise of such discretion, a further review of the board's action is available to employees under provisions of state law.

TIME LIMIT TO RAISE A GRIEVANCE

Having now defined a grievance within the terms of the agreement between the parties, it is necessary to further include a limitation with respect to the time for raising the grievance. There are, unfortunately, agreements in existence between teachers and school boards, as well as

other public and private employers and their employees, which do not include a time limit for the raising and/or processing of a grievance. The failure to include such a time limit is a disservice to all parties. Reducing it for the moment to the absurd, an alleged grievance could be raised months or even years after the occurrence of the matter in question. The "festering" of such a grievance, the dimming of memories long after the occurrence of the events complained of, as well as perhaps the unavailability of certain records or individuals to testify, are all cogent reasons why a grievance should be filed and pursued in a timely fashion.

It is true, however, that management could argue that where a grievance had been raised long after its occurrence, the legal doctrine of "laches" applies to preclude the hearing of such a grievance. While management may very well prevail in such an argument, there is, of course, the possibility that an arbitrator might rule to the contrary and state that the grievance was timely. In any event, it will be necessary to pursue the matter through an appropriate legal forum, thereby incurring costs which could be avoided.

In short, the simple solution is to provide within the terms of the agreement itself a time limit for the raising of a grievance. Such a time limit may be stated in calendar or school days. Arbitrators have generally held that "days" involved without any further language refers to calendar days,

unless the parties have indicated otherwise. An appropriate time for raising a grievance would, in my judgment, be perhaps five or ten school days or an equivalent number of calendar days.

The teachers' association will generally point out that it is possible for a grievance to arise without the grievant being aware of it and that the tolling of time for raising a grievance may well run before the grievant becomes aware of it. Certainly, it is undesirable from management's viewpoint to include language in the agreement providing that the grievant has a certain number of days after he "becomes aware" of the grievances to raise it. Theoretically he may "never become aware of the grievance" and we are then back to the open-ended raising of a grievance as noted above.

From management's viewpoint, a fixed number of days with no "loopholes" would be preferable. However, a compromise which a number of school boards and teachers' associations have agreed upon is essentially as follows:

> "A grievance may be raised within _____ days after the occurrence of the grievance or within _____ days after the grievant would reasonably be expected to know of its occurrence."

ASSOCIATION REPRESENTATION

The teachers' association usually seeks a provision in the agreement to the effect that an association representative shall be present at every step of the grievance procedure.

From the view of the union this is quite natural since it seeks as an entity to prevent any of its members from "making any deals" which could be of detriment to the association or its membership as a whole. On the other hand, the presence of an association representative at the first step of the grievance procedure may very well inhibit the possibility of the parties reaching an accommodation and thereby preventing the grievance from going any further in the procedure. A compromise often worked out in negotiations provides that the grievant may, at his option, have an association representative present at the first step of the grievance procedure.

INTERMEDIATE STEPS OF THE GRIEVANCE PROCEDURE

Generally, the first step does not require that the grievance be in written form but may be raised verbally. After the first step of the grievance procedure it is prudent to require by contract terms that the grievance be reduced to writing. Most school board grievance procedures provide for three or four steps in the grievance procedure prior to the terminal step. There is nothing magic in either the three or four step grievance procedure and much of this will depend on the desires of the parties and also the size of the system involved. For example, in a large school district, it would not be unreasonable to expect that the first step of the grievance procedure involves a "supervisor" which could be for example, a department head. The second step of the grievance procedure would be with the principal, and

the third step with the superintendent. Thereafter, a fourth step could be to the board of education and a fifth step could be arbitration.

The number of days to move a grievance from one step to another and the number of days allotted to "management" to reach a determination at each step is purely a matter of individual preference and negotiations between the parties. However, a sufficient amount of time should be allotted so that the appropriate management representative will have an adequate amount of time in which to properly respond to the grievance. Usually these intermediate steps provide for three to five days for the processing of the grievance and an additional three to five days for management's response to the grievance.

TERMINAL STEP OF THE GRIEVANCE PROCEDURE

Finally, we turn to the terminal step of the grievance procedure. In the private sector, binding arbitration as the terminal step of the grievance procedure is almost universal. This, of course, is not the case with respect to the public sector where the concept of "advisory" or "non-binding" arbitration has been developed. In my view the development of this procedure has arisen in response to two major concerns of public employers. The first concerns itself with the nonavailability of "neutrals", that is, arbitrators, mediators, fact-finders, etc., who are knowledgeable with respect to matters relating to public sector employers.

Private sector experience in either industrial or commercial areas is not readily transferrable to the public sector where political, legal and legislative problems exist. In addition, public employers, including school boards have sought to jealously guard their so-called prerogatives and responsibilities under the law and have been most reluctant to agree to a terminal step of a grievance procedure such as binding arbitration which would in the view of many public employers strip the public employer of those very rights and responsibilities.

The argument by the unions in the public sector has essentially revolved around two major premises. The first is the argument by the employee groups that it is unreasonable and unfair to provide that one party to a bilateral agreement should have the right to interpret the agreement between the parties including the issue as to whether or not the agreement has been violated. In addition, in areas of Civil Service jurisdiction, unions have argued that Civil Service proceedings are too slow and cumbersome and that the Civil Service Commission is "management oriented."

The number of public employers agreeing to binding arbitration as the terminal step of a grievance procedure is growing. Often, the quid pro quo for management's agreeing to binding arbitration has been a narrowing of what otherwise would be a broad definition of a grievance. In some negotiations, the association annually seeks binding arbitration

while the board of education counters with a request for a limiting of the definition of grievance. The perennial "stand off" then results and the parties continue to have a broad definition of a grievance procedure with a terminal step resulting in advisory arbitration.

ADVISORY AND BINDING ARBITRATION

A word for the moment on advisory arbitration. Although a board and an association are not necessarily bound by the advisory arbitrator's opinion, in my view, the board should accept and be bound by the advisory arbitration decision unless the decision is so onorous that the board simply cannot be bound or unless the arbitrator has grossly misinterpreted the agreement or directed the board to commit acts beyond its legal power.

What are the differences between advisory and binding arbitration? The differences are quite obviously spelled out in the terms themselves. The procedures for both binding and advisory arbitration are essentially identical with the exception that at the conclusion of the arbitration hearing and the submission of the arbitration report, either or both sides may or may not agree to be bound by the provisions of the arbitrator's opinion and award. In all other respects, the advisory arbitration proceeding and the binding arbitration proceeding are similar in that they are run essentially along the lines of a judicial proceeding. However, the rules

of evidence are relaxed in an arbitration proceeding and arbitrators quite often during the course of such a hearing make the general statement, "I'll let the evidence in for what it is worth." The arbitrator's view is that since there is no jury involved, and since the arbitrator is an expert in the field, he will not necessarily be unduly, if at all, influenced by what might normally be evidence that is excluded from a court proceeding on various grounds such as hearsay, etc.

SELECTION OF THE ARBITRATOR

There are a number of sources of arbitrators to hear disputes in the public sector. The most popular appears to be the American Arbitration Association with offices in major cities throughout the United States. A regional office was recently opened in New Brunswick, New Jersey. The American Arbitration Association for a modest fee will furnish lists of arbitrators to the parties. These lists will contain between seven and nine names, accompanied by a biographical sketch of each. The parties may strike any or all of the names from the list and will then forward separately to the AAA the names remaining on the list in order of preference. If there is no match-up after one list is submitted, the AAA will furnish a second list. In the event there is no match-up after the furnishing of the second list, then the AAA will designate an arbitrator other than one whose name has appeared on either the first or second list. The Federal Mediation and Conciliation

Service as well as the New Jersey State Board of Mediation operate along essentially the same lines.

A number of boards and teachers groups have agreed to utilize the facilities of the New Jersey State Public Employment Relations Commission in the selection of an arbitrator. The scope of such selection is much more restricted than through any of the aforementioned agencies noted above. Under PERC rules, the Commission will furnish each party with the names of five potential arbitrators along with a biographical sketch of each. Each party may strike two of the five names from the list and is required to rank the remaining three. Thus, there will be a match-up among the five names. In my view, it is preferable for both sides to utilize an agency other than PERC so that a wider latitude exists for both sides.

ARBITRATOR'S AUTHORITY

The agreement between the parties should carefully delineate the fact that the arbitrator does not have the power to alter, amend or modify the agreement in whole or in part nor does he have the power to request either of the parties to commit an illegal act. His sole authority should be limited to the interpretation of the agreement.

It is recommended that language be included in the arbitration clause to require the arbitrator to follow the school laws rather than using his own sense of justice. Such language could be as follows:

> "In formulating his decisions, the arbitrator shall adhere to the statutory law of New Jersey and to the pertinent decisions of the Commissioner of Education, the State Board of Education and the Courts."

In the event the arbitrator exceeds his powers, an appeal would lie with the Courts on such grounds.

ARBITRATION AWARD AND COSTS OF ARBITRATION

In addition, the parties often request that the arbitrator submit his opinion and award within a specified period of time. The rules of the American Arbitration Association provide that the arbitrator's opinion and award must be issued within thirty (30) days after the close of the hearing. In the event this report is not issued within the prescribed time, either of the parties may seek to have the arbitrator disqualified and a new arbitration hearing set. It is rare that the aforementioned procedure is utilized.

The arbitration clause should also provide that the parties will share the cost of the arbitration proceeding itself, that is, the arbitrator's fees and expenses, if any, as well as the cost of the hearing room, if any. All other expenses in connection with the arbitration case must be borne by the party incurring same.

ARBITRABILITY

A final note of caution. A proliferation of cases exists in the Appellate Division of the New Jersey Superior Court

concerning arbitrability, a number of which have been filed by school boards to enjoin an arbitration proceeding on the grounds that the case more properly belongs before the Commissioner of Education or that the Commissioner has sole and exclusive rights to hear such a case. We have noted above the potential problems which exist in the public sector whereby an employee may elect to pursue a remedy under arbitration or Civil Service or perhaps through the office of the Commissioner of Education. Such an opportunity would give the employee so-called "two bites of the apple." In my view the aggrieved individual should select the forum through which he wishes to pursue his grievance and be bound thereby and not permitted the luxury of forum shopping by perhpas losing his case in one forum and seeking to have it adjudicated in another forum. In a matter involving a Civil Service proceeding, this can be prevented since there is a definite time limit for raising a case with Civil Service (that is twenty (20) days after the determination of the final "authority"). A clause can readily be written which would in effect provide for an "election of remedies" by operation of a calendar.

However, no such time limit exists with respect to taking a case before the Commissioner of Education. While the Commissioner may argue that a case suffers from the legal impediment of laches, nevertheless there are no clear cut rules that have been promulgated by the Commissioner stating that a case must be brought within a particular period of time. A number of

school boards (perhaps as many as a dozen) in the State of New Jersey have therefore, for various reasons, brought suits to enjoin an arbitration proceeding again generally on the basis that the matter more properly belongs before the Commissioner, the matter is not cognizable before an arbitrator in any event and/or the matter is solely within the judgment and discretion of the Commissioner and that the arbitrator is totally without power to hear the case or render a decision.

It is suggested that serious consideration be given by the New Jersey School Boards Association to seek a ruling from the Commissioner by whatever legal method would be appropriate including the promulgation of a rule or a regulation providing that an aggrieved teacher seeking to have a case heard before the Commissioner must bring that case within a specified period of time.

SUMMARY

In sum then the essential elements of an effective grievance procedure in a school board agreement are as follows:

1. A definition of grievance limiting the grievance to contract terms.

2. A specific exclusion of certain areas to be beyond the scope of the grievance procedure.

3. A time limit for raising the grievance in the first instance.

4. A provision that the first step of the grievance procedure shall be informal and that the aggrieved may or may not at his option be represented by an association representative.

5. A requirement that the grievance shall be reduced to writing at the second step of the grievance procedure.

6. Provisions to the effect that approximately three to five days be available for raising a grievance at any step with an additional three to five days for management to respond. These days should be spelled out either in calendar or school days as the parties may agree.

7. A terminal step of the grievance procedure providing for either advisory or binding arbitration with such a proviso generally linked to whether the definition of grievance is a broad or narrow one.

8. Provisions spelling out the authority of the arbitrator.

9. A method for selection of the arbitrator through the American Arbitration Association or similar agency.

10. Provision for sharing of costs of arbitration.

VI

Proper Evidence and Tactics in Processing a Grievance

VINCENT C. DE MAIO, ESQ.

Vincent C. De Maio is a graduate of Rutgers University and the Harvard Law School. He also received an LL.M. in Labor Law from the New York University School of Law. Engaged in the practice of law in Matawan, New Jersey, Mr. De Maio serves as counsel to many school districts and municipalities. A member of the Monmouth County, New Jersey and American Bar Associations and the New Jersey Association of School Attorneys, he has served as Associate Professor of Law at the law schools of the University of Arkansas and Seton Hall University, and as a lecturer at the New York University School of Law.

The assigned topic, "Representing School Management in the Grievance Process," assumes that the speaker has the answers to the question of what are the proper tactics to use on behalf of management in processing a grievance. The assumption is a gratuitous one and my function this afternoon is the more modest one of sharing with you some of the mistakes that I have made so that, hopefully, you will not make the same ones.

As you are already aware from the exposition which was made by Gerry Dorf concerning the drafting of the grievance clause, there are really two separate and distinct phases in the grievance process. The first phase is what I call the internal phase and the second is the external phase. By internal I mean those portions of the grievance process which take place completely within the school system. Conversely, by the external phase I refer to the step outside the school system

usually before a single arbitrator. For purposes of our discussion this afternoon, I will assume that the grievance clause provides for one or more steps within the school system and a final step of binding arbitration. Typically the attorney will be much more at home at the arbitration stage because it is an adversary proceeding and the kind of activity with which he is familiar. Therefore, I propose to concentrate my observations on the internal phase.

The internal phase, while having aspects of an adversary process, has other aspects as well and is in many ways sui generis. As many an expert in the field has noted, the relationship between labor and management is a continuing one requiring day to day contact and, therefore, a breakdown in this relationship does not lend itself to the same approach as one would use in the breakdown in a commercial relationship where the parties need never deal with each other again. This aspect of the relationship between the parties leads me to suggest that at the internal level your skills as a reconciler of differences are as important as your forensic abilities at a trial.

With that background, let me hasten to add that, notwithstanding that it is important to attempt to reconcile differences, the overriding fact is that the internal phase may well lead to an arbitration proceeding and therefore you must attempt to protect your position in the event you are unable

to reach a satisfactory adjustment. Obviously, the way in which you approach the internal phase depends on the way you view the function of this aspect of the grievance machinery. As I have already indicated, I view one aspect of it as being an exercise in problem solving. The fact that a grievance exists indicates to management that something which it has done has evoked an unsympathetic response on the part of an employee or group of employees. The complaint may be imagined, it may be real, it may be politically motivated, it may be part of a general harassment of a particular administrator or of the entire administrative process in the school. It is management's problem to decipher the nature of the complaint and to deal with it accordingly. Once the judgment is made as to the motivation behind the grievance, the way in which the grievance is handled thereafter follows from the first assumption. In this respect the approach you use may well be different from the approach at the arbitration which is an all-out adversary proceeding.

Because grievances may be differently motivated, there is really no single best way of handling them. It this respect, the handling of a grievance, like cross-examination, is an art more than a science and like cross-examination, is tied more to tact, judgment and preparation than it is to fixed substantive rules. Substantive rules to a lawyer are a security blanket giving confidence where perhaps confidence is not warranted. Be that as it may, there are few if any

substantive rules in the internal handling of a grievance. In an attempt to supply a security blanket, let me say that the basic rule is common sense.

There are several observations which I would like to make in regard to this internal phase. Although as I have indicated, it is an exercise in problem solving, experience indicates that an overly large proportion of the problems will not be solved without going to arbitration. Therefore, if you are to be properly prepared for the terminal step, either you, or at your instruction, the administrators who are involved at the lower level, should have made certain that the preliminary steps were used as a kind of pre-trial discovery mechanism. In this connection you should have endeavored to compel the grievant to pinpoint the nature and the basis of the grievance and relief sought.

Perhaps I can indicate what I mean by using an actual case in which I was recently involved. The facts were that the superintendent of schools attempted to use a telephone device which connects the classroom to the home of a disabled student. In the actual case, a student in one of the lower grades had open heart surgery and was disabled from attending classes for a period of time. The student was receiving home instruction, but the superintendent of schools decided that the school to home hookup would supplement the home teaching and be of significant benefit to the student. This was the

first instance of the use of this kind of a device in that school system. He soon began to hear rumblings from the teacher indicating the teacher's unhappiness, all of which was phrased in terms of there not being sufficient forethought given to the use of the device, that there was inadequate planning and preparation preceding installation and the fear that because of the relatively young age of the pupil, the device would be ineffective as a teaching tool.

Ultimately a grievance was filed which reached the board level. In the process of the grievance reaching the board level, the superintendent had denied the grievance on the ground that he could see no contract violation and on the further ground that the right to use innovative teaching devices was clearly conferred on management by a very broad management rights clause. At the board level the NJEA representative started the proceedings by asking the superintendent to justify his decision. At this point one could easily succumb to the temptation to go into a long discourse on the rights of management and the efficacy of the management rights clause. In my judgment to do so would have been wrong. Instead, I suggested to him that he was putting the cart before the horse and that the burden was upon him to establish that there was a valid grievance.

In this connection I tried to emphasize the distinction between the concept of grievability and the concept of arbitrability. The definition of a grievance in this particular contract was very broad while the definition of what was

arbitrable was very narrow. In an attempt to use the board level hearing as a pretrial discovery technique, I sought to have the association representative give me the specific article and section number of the contract on which he was relying and to spell out the relief which was sought. In the course of this process it began to appear that the teacher's concerns and the association's objective were not identical. It seemed to me that the teacher had a bona fide concern with the efficacy of the device in the context in which it was sought to be used, while the association's principal concern was that the use of the device changed the teacher's working conditions. By asking the association what relief it sought, it then developed that the association's position was one which would require the board of education to consult and negotiate with the association before the device could be used. Apparently this dichotomy had not been apparent earlier.

If the teacher's approach was to prevail, the handling of the grievance would involve primarily the process of attempting to educate her as to the desirability of using the device, and secondarily the development of a planned program for its use. In such a posture the grievance simply indicates the need for better communication between the administration and the teacher, and one could anticipate that the problem would not arise again.

If the association's approach prevails, however, the problem is a completely different one. The issue then becomes one of contract analysis to ascertain whether or not there were limits on management's right to use the device. By insisting on the association's citing specific contractual provisions, it became apparent that there was no specific article in the contract on which the claim could be predicated. There was some language pointed to, but in my judgment the language relied on was irrelevant. The particular grievance has not yet been disposed of by the board, but I suspect it will recognize that the set of facts presented a grievance but not a grievance which is arbitrable. I do not want to get into Pete Kalac's subject of arbitrability, but assuming that the board denies this particular grievance and assuming further that the Association seeks to go to arbitration, it would be my judgment that the board should resist it.

It seems to me that this incident illustrates that there may be more than one interpretation placed on a grievance and emphasizes my first observation that you should always insist on the grievant's particularizing the nature and the basis of his grievance and the remedy sought.

My second observation is that you, or the administration, must carefully investigate the grievance. By this I do not mean simply an investigation into the <u>facts</u> of this particular grievance, although that goes without saying. Nor do I mean

simply that you must scrutinize the language of the contract in detail, since the contract is in effect the substantive law of your case. In addition to the foregoing, the investigation should take you into at least two other areas. The first is the area of "past practice" and the second is the settlement of prior grievances involving the same or similar issues.

The concept of past practice is one which arbitrators use as a way of filling in the gaps of ambiguous language. It is a reliance on a kind of common law of the school system as distinguished from the actual language of the agreement. As a given administrative decision is contested by a grievant, if the language of the contract is susceptible of conflicting interpretations or is otherwise unclear, the arbitrator if you reach that level, will be interested in what the past practice has been, if any. If you have constructed an elaborate argument based on a very complicated syllogism, you can be very embarrassed when the association produces witnesses that the past practice for a number of years in your school system has been just the opposite of what you urge. I know it can be embarrassing because it has happened to me. As part of your preparation, you must explore the areas of past practice with your client.

The settlement of prior grievances involving the same or similar issues must also be investigated because even

though the settlement does not reach the level of past practice, it can be used to argue that the settlement is a recognition by both parties of the proper interpretation of the language involved.

A word of caution is in order, however, in that there are conflicting decisions by arbitrators as to the effect of a prior settlement. In Anaconda Aluminum Company and Aluminum Workers International Union, Local 150, 70-1 ARB, Paragraph 8212, the arbitrator held that since the company had settled a prior grievance relating to improper overtime assignment by full payment of the requested amount without stating that the settlement was not to be considered a precedent, the prior settlement was evidential. In Millen Industries Incorporated, Miami Valley Paper Company Division and United Paper Workrs and Paper Workers of America, Local 54, 72-1 ARB Paragraph 8020, the arbitrator held that while the settlement of a single grievance would not constitute a binding practice, the company which relied on the prior settlement could invoke the doctrine of equitable estoppel against the grievant. In Continental Oil Company and Independent Oil Workers Union of Oklahoma, 69-1 ARB, Paragraph 8196 and in Modine Manufacturing Company and International Association of Machinists and Aerospace Workers, Lodge 1000 68-1 ARB, Paragraph 8314, arbitrators held that prior settlements were not binding.

Prior grievances which were not settled and went to arbitration should also be studied for whatever impact they may have on your pending matter. Although arbitrators disagree as to whether a prior award by a different arbitrator should be considered binding on a second arbitrator, one cannot overlook the pursuasive value of a prior award.

In this connection it becomes important that some system be developed by the employer for recording and indexing all grievances and awards. A simple system which I have developed involves the assignment of a docket number to every grievance which is filed. All grievances filed are given a four digit number indicating the year in which the grievance originated, followed by a digit which indicates whether the grievance is the first, second or third, etc. of that year. By adding still a third digit, which is a code for the building in which the grievance originated, you can rapidly ascertain the number of grievances in a given year, as well as the building in which the grievance originated. The docket number must, of course, be assigned by a central source.

The index system I use to gain entry into the grievances which are filed serially by docket number is a simple one using 4x5 index cards. I have found it useful to provide for three separate methods for entry. The first is by indexing according to the name of the grievant. The second is by reference to the name of the arbitrator and the third is by

reference to a subject heading. For this latter purpose the classification guide currently in use by the American Arbitration Association, the NEA and the National School Boards Association is used. This system enables the school's record to be usable without reference to memory so that in the event of a change in personnel, the data will still be readily available.

Another aspect of your investigation should be into the area of whether or not any demands have been made in the bargaining process which relate to the issues involved in the grievance. Parenthetically I add that where the dispute concerns the meaning, interpretation and application of contract language, the matter has come to arbitration only because there is an ambiguity as to the language. In most cases, therefore, if the language were not ambiguous, the matter should have been settled at a lower level. This being the case, your investigation must be geared to ascertain anything in the background which will persuade a neutral observer that your interpretation is correct. Past practice, prior settlement, prior arbitration awards, are all useful in this connection. Events in the negotiating process may similarly be of help in persuading the arbitrator. For example, if the association has made a demand in the bargaining process which would restrict the board's right to engage in certain conduct, the fact that the demand was withdrawn is persuasive that the grievant is attempting to secure by arbitration what he was not able to get by negotiation.

Once you understand the nature of the grievance and have investigated it in the manner I have suggested, you come to the point where a decision has to be made in evaluating its merits. Let me briefly suggest some considerations in this process.

1. The contract gives you time within which to take action. Do not be precipitant. Take all the time you need to reach an informed judgment.

2. Particularly at the lower levels of the grievance process, keep all members of the administration informed of what is taking place. You may discover that what appears to be an isolated problem is not unique to a particular building at all. This cross conferring will also help to assure consistency and uniformity.

3. Be honest and objective with yourself as to the merits of the claim. There is no point in kidding yourself as to whether you have a "winner." If the matter is arbitrable you must face the day of reckoning sooner or later.

4. If you have a loser, recognize it early and find some face-saving way of reversing the decision. If there is a mature relationship between the association and the board, this will not be difficult. If the relationship is a poor one, you will simply have to struggle with the problem.

5. If the matter complained of is grievable but not

arbitrable, do not encourage a cavalier administrative approach which simply pays lip service to due process. Encourage your administrators to listen to the grievant; they may in fact learn from the process. By the same token, where the grievnace is baseless, frivolous or clearly without merit, encourage your administrator to learn to say firmly, clearly and concisely, "No, the grievance is denied."

VII

Arbitrability and the Restraint of Arbitration

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Chapter 303 of the Laws of 1968 (N.J.S. 34:13A-1, et seq.) brought with it a myriad of problems for school boards throughout the state. All of you are familiar, I am sure, with the fencing that went on at bargaining tables initially and, in all probability, is still going on in many districts concerning what is and what is not negotiable. This problem unquestionably has been caused by the lack of guidelines.

Some of you undoubtedly are aware that two years ago the Public Employment Relations Commission was about to make a determination setting out once and for all which items it considered negotiable. It is my understanding that the Commission was persuaded to withhold such a determination in view of the fact that a decision from the New Jersey Supreme Court was imminent in the case of Burlington County v. Cooper.[1]

Our Supreme Court ultimately decided in that case that since Chapter 303 did not confer authority on the Public Employment Relations Commission to issue affirmative remedial orders either expressly or by unavoidable implication, the Commission

therefore did not have authority to hear and decide unfair labor practice charges. Consequently, the Public Employment Relations Commission never made its determination on the negotiability issue and new legislation conferring the necessary authority has never been passed, although A-520 is presently in the hopper.

This bill would confer upon the Public Employment Relations Commission the authority it needs to function more adequately. Consequently, at this late date, more than four years after the enactment of Chapter 303, New Jersey school districts continue to remain in the dark with regard to many important questions with which they are confronted daily.

You might be asking yourself at this point what all this has to do with my topic of Arbitrability and Restraint of Arbitration. The problem, of course, is this. Without the aforementioned guidelines, New Jersey school boards, which were totally unprepared for the impact of Chapter 303, set out to negotiate labor agreements with their teachers. The results of some of these negotiations have been somewhat disheartening. I am convinced some districts had their board president and secretary affix their respective signatures to the teacher demands and consequently, the demands became the newly negotiated contract. Now the day of reckoning has arrived. The greater number of negotiated contracts in New Jersey have arbitration clauses with provisions for binding arbitration. Most of these contracts adopt by reference the

American Arbitration Association rules and regulations. Consequently, each time a controversy or dispute arises in the district, or what was formerly considered a controversy or dispute, the local teachers association has a choice of forums. It can petition the Commissioner of Education to hear and decide the issue in controversy, or process a grievance which, if not adjusted to the satisfaction of the grievant, can be taken ultimately to an arbitrator for a determination.

Some of you attorneys who actually conduct your board's negotiations were aware of this problem from the outset. I know, for instance, various attempts to avoid this foreseen problem were tried. For instance, the definition of what constitutes a grievance was drafted in such a way as to exclude those areas wherein a specific method of review is available by the Commissioner of Education. This, of course, would be the tenure hearing and withholding of increment cases. As an example of some language which has been used to narrow the scope of what constitutes a grievance, let me read certain language from a teacher's contract with which I am familiar. The limitations are as follows:

1. Any matter for which a method of review is otherwise specifically prescribed by law (The parties recognize that N.J.S.A. 18A:6-9 grants jurisdiction to the Commissioner of Education to determine all controversies and disputes, however it is intended said controversies and disputes will be processed through the grievance procedure except in those areas where Title 18A otherwise specifically prescribes another method of review.)

2. Any rule or regulation of the State Department of Education having the force and effect of law.

3. Any decision of the State Commissioner of Education having the force and effect of law.

4. Any matter which according to law is exclusively within the discretion of the Board.

Despite these restrictions the dual forum concept remains, and the only sure way to avoid the problem of the dual forum would be to negotiate an arbitration clause which does not have a binding arbitration provision, and I suspect very few of the large districts enjoy this luxury, or an overall agreement concluding in binding arbitration which agreement consists additionally of only a salary schedule and the recognizable money fringe benefits. Any disputes arising under the latter type of agreement would be proper subject matters for arbitration in any event. This the Commissioner of Education even acknowledges and I will touch on this matter later. So much for the fantasy world of Plato, however, since contracts of the type I just mentioned are becoming harder to find.

The critical and practical problem now facing many districts which have teacher agreements with 30 to 40 articles is what happens when the teachers grieve and ultimately want to arbitrate the issues of curriculum, academic freedom, calendar and the like, and these items have been negotiated and incorporated into an agreement with the local teachers association. Are these proper subject matters for arbitration?

Do agreements of this type constitute ultra vires acts on the part of the board of education? Are the provisions of these agreements enforceable? If they are enforceable, how do you restrain the arbitrator from deciding these issues? I will deal with these questions shortly.

However, before getting into what is happening in this area of the law, I want to point out what a quick perusal of the October 1, 1972 issue of "Arbitration in the Schools" will reveal. The cases reported in that single issue showed that in New Jersey arbitrators decided questions of class size despite the mandatory powers possessed by a board of education by virtue of N.J.S. 18A:11-1; involuntary transfers, despite the fact that N.J.S. 18A:25-1 gives the board of education the right to transfer teaching staff members by a recorded roll call majority vote of its full membership; and a question involving the reappointment of teachers to a summer vocations program wherein the grievance was sustained despite the fact that the arbitrator found that the board does have the "legal responsibility" to decide whether to reappoint teachers for summer programs. These, gentlemen, were reported arbitration awards in one issue only. And they were not awards made in Michigan, New York or Pennsylvania, but in New Jersey. "Arbitration in the Schools" is published monthly, and a yearly review of 12 issues would point out various other areas where arbitrators are deciding questions which most of us, I am sure, believe are strictly managerial

prerogatives. If you want the names of the cases I just cited and the names of the arbitrators who decided the questions in issue, I will be happy to supply them later.

Now I would like to get back to the question I raised previously. We all realize that this concept of binding arbitration in the public sector is in its formative stages. Nevertheless, as attorneys, we have been trained to think and act in certain ways in relationship to written contracts. However, there now appears to be a strange phenomenon developing which, from every indication, is indigenous only to interpretation of contracts in the public sector. It all began with the case of Porcelli v. Titus.[2] Most of us here, I am sure, are familiar with the facts in Porcelli. The Newark Board of Education and the Newark Teachers' Association had an agreement which provided for promotions to the positions of principal and vice principal in the order of numerical ranking from an appropriate list. The rankings of applicants were to be determined by written and oral examinations. The plaintiffs were teachers who had been placed on the list after having successfully passed the prescribed examinations. The Newark Board of Education unilaterally altered the promotion procedure agreed upon by suspending the making of any appointment to the positions of principal or vice principal from the previously developed promotional lists and subsequently placed the plaintiffs in a general pool of qualified candidates. Consequently, the plaintiffs lost the advantage they had acquired by being

on the previous promotional lists. Suit was instituted by the teachers so affected and the Court stated in its opinion:

> "We endorse the principle...that faculty selection must remain for the sensitive expertise of the school board and its officials, and this we do notwithstanding an existing employment agreement."

The Supreme Court thus swept asunder what had been won by the teachers at the bargaining table, and what had been previously considered legally binding contractual language by the parties was no more. This decision of the Supreme Court undoubtedly gave impetus to boards of education to seek judicial relief by way of restraint of arbitration in many instances which on their face definitely appeared to be within the realm of arbitration.

I do not know exactly how many such suits have been instituted by boards of education attempting to restrain arbitration because in most instances the cases are unreported and some of the attorneys involved in these cases, and I include myself among this group, have been delinquent in reporting these cases to our School Attorneys Association and the New Jersey School Boards Association.

However, certain cases of this type have come to my attention and I would like to comment on these. For instance, the Long Beach Island Board of Education had a little difficulty earlier this year involving the application of a certain portion of its teachers salary guide. It appeared that

the agreement between the board and the local teachers association provided for additional remuneration for teachers who gained graduate credits. The pertinent portion of the contract reads:

> "$25.00 for each additional graduate credit up to 32 beyond Bachelors and beyond Masters."

A fourth grade teacher in the district undoubtedly not realizing how well off he was decided to go to law school at night. The issue raised, of course, was whether or not the law school credits he gained were recognizable graduate credits which entitled the teacher to the additional contractual emolument. The teacher grieved and ultimately sought arbitration of the issue. The board of education went into Chancery to have the arbitration restrained.

Let's pause for a moment and reconsider these facts. First, the contract provides for additional financial remuneration for any teacher who obtains graduate credits. Second, the teacher has successfully completed certain law school courses for which credit is given by the law school. Third, the board refuses payment to the teacher on the basis that its interpretation of what the words "graduate credit" mean, does not encompass law school credits. Fourth, the teacher's position is that his interpretation of the words "graduate credit" does encompass law school credits.

These facts unquestionably constitute a difference of opinion by the parties concerning the application of contractual

language, and who decides questions of this type under a contract which incorporates by reference the rules and regulations of the American Arbitration Association. An arbitrator, of course. WRONG! Jim Wilson, Long Beach Board of Education attorney had the arbitration of the issue restrained in Chancery and he and Tom Cook who was in the case amicus subsequently convinced the Court that this issue should be decided by the Commissioner of Education. The Court stated in its decision:

> "...This dispute does constitute a controversy arising under the school laws and involves the interpretation of educational policies of this State and that it is in the best interests of public education and general uniformity of school law that the Commissioner of Education decide this in the first instance."

This is a further extension of Porcelli. However, where the Porcelli result was reached on the basis of constitutional arguments, the Court in the Long Beach Island case concerned itself with the uniform application of New Jersey's school laws. In any event, the result was the same. The individual grievants and the local association were frustrated in attempting to enforce what they believed to be legally enforceable contractual rights.

Within the last several months, I have personally been involved in a matter which required the obtaining of a restraint of arbitration. The case developed from a prolonged negotiation session which extended over a period of nine

months. The teachers believing they were being frustrated at the bargaining table, obtained an Order to Show Cause against the board alleging that the board of education was not bargaining in good faith.

One of the reasons for the allegation of bad faith negotiations was the fact that simultaneously with the negotiations the board was conducting, for economy purposes, a curriculum study which ultimately would result in a reduction of the non-tenure staff. The teachers believed the board to be using the ultimate reduction in staff as a negotiations weapon which they characterized in their pleadings as "a war of nerves."

The contractual deadline for notifying non-tenure teachers of their contractual status for the ensuing year happened to be April 1. The board, on March 30, sent each non-tenure teacher a letter stating that as of April 1 contracts were not being issued since the curriculum study had not been concluded and salary negotiations were still being conducted. This letter was sufficient in my opinion to meet the contractual requirement of notifying non-tenure teachers of their status for the ensuing year on or before the April 1 deadline. The non-tenure teachers now had a choice to seek jobs elsewhere or take their chances of waiting until they were issued contracts.

The Court found that the board had been negotiating in good faith and had met its contractual obligation to notify non-tenure teachers of their contract status on or before April 1, and the matter was promptly dismissed. Shortly thereafter, the curriculum study was concluded and seven non-tenure teachers were not offered contracts for the 1972-73 school year.

The teachers filed a grievance, attempting to have the seven non-tenure people reinstated. The board refused to process the grievance. This board, incidentally, is the same one which has the limitations on the definition of grievance which I had read to you earlier. The board's refusal was predicated on the fact that the non-offering of contracts to non-tenure teachers was excluded from the definition of a grievance. The local teachers' association promptly obtained a panel of arbitrators and the board promptly obtained a restraint from Chancery. Before the matter was heard, six of the seven teachers found teaching jobs and the seventh left the teaching profession -- he may have enrolled in law school -- I don't really know. In any event, the issue became moot and was never argued before the Chancery Division.

In my opinion, any case of this type where an attempt is made to place the issue of re-employment of a non-tenure employee before an arbitrator must be restrained. These types of cases unquestionably belong before the Commissioner of Education.

The most recent case involving a restraint of arbitration is Board of Education of the Township of Rockaway v. Rockaway Township Education Association. This case has been approved for publication and contains some very important language. The facts are basically these: A seventh grade teacher of humanities was directed by the superintendent of schools not to conduct in his class a previously announced "debate" on the subject of abortion. The agreement between the board and the local teacher association provides a paragraph on academic freedom which reads:

> "The Board and the Association agree that academic freedom is essential to the fulfillment of the purposes of the Rockaway Township School District. Free discussion of controversial issues is the heart of the Democratic process. Through the study of such issues, political, economic or social, youth develops those abilities needed for functional citizenship in our Democracy. Whenever appropriate for the maturation level of the group, controversial issues may be studied in an unprejudiced and dispassionate manner. It shall be the duty of the teacher to foster the study of an issue and not to teach a particular viewpoint in regard to it."
> (Emphasis added)

The teacher alleges that his academic freedom as guaranteed by the above quoted paragraph was being denied him in view of the superintendent of schools directive. The local association then sought to arbitrate the issue and the board filed its complaint seeking an injunction and asserting that the appropriate forum was the office of the Commissioner of Education.

The Court in its opinion stated:

"It is clear that both the Board and the Rockaway Township Education Association agreed that 'academic freedom' is essential to the fulfillment of the purposes of the school district. The heart of the problem is the fourth sentence in the quoted section of paragraph XXVII (C):

> 'Whenever appropriate for the maturation level of the group, controversial issues may be studied in an unprejudiced and dispassionate manner.'

"This Court takes judicial notice that the subject of 'abortion' whether in moral or legislative concept is controversial. The collective bargaining agreement between the Board and the Rockaway Township Education Association contains no provision as to who is to determine 'the maturation level' not of the teacher but of the'group' of students.

* * *

"To determine 'maturation level' requires expertise in education. A trial court is not so qualified.

"This then places the obligation on either the teacher or the Board or both. When disagreement arises, shall it be settled before a panel selected from the American Arbitration Association or before the Commissioner of Education with review by the State Board of Education and, thereafter, the Appellate Courts?

* * *

"...It is to be noted that the American Arbitration Association may be well qualified to 'arbitrate' compensation, hours of work, sick leave, fringe benefits and the like, but they and their panels possess no expertise in arbitrating the maturation level of a seventh grade student in the elementary schools of Rockaway Township."

The Court concluded that the Commissioner of Education with his special expertise was more suited to decide the issue

than the American Arbitration Association. The Court also stated, and I believe this to be very important language:

> "It is concluded, therefore, that if the contract is read to delegate to a teacher or to a teacher's union, the subject of courses of study the contract in that respect is ultra vires and unenforceable."

In view of this language, I believe that every school board attorney should make certain that the grievances being filed in his district are carefully reviewed, particularly, the grievances that are being referred to arbitration.

As I pointed out earlier, boards of education were not prepared for the impact of Chapter 303, and I suspect many contracts negotiated with local teacher associations throughout the state contain unenforceable language. If you board attorneys who are present did not personally involve yourselves in negotiating your board's agreement with its teachers' association, and I suspect many of you did not, I would strongly recommend that you review the agreement that your board is functioning under. I suspect you may find some startling language.

I would expect, however, that if you do review your agreement and language, which in your opinion is unenforceable, you will not be successful in trying to have it removed at the next negotiating session. Teachers do not voluntarily give up what they have previously gained at the table even though you might convince them that it is unenforceable.

Nevertheless, in view of the language used by Judge Stamler in the Rockaway Township case, and the language that can be found in Lullo v. International Association of Firefighters[3], where our Supreme Court emphatically stated that public agencies such as boards of education cannot abdicate or bargain away their continuing legislative or executive obligation or discretion, I believe also that every school board attorney has an obligation to his client to make certain that in his district the American Arbitration Association is not deciding issues involving language which our Courts would certainly not enforce.

What should be done in the event that a grievance is filed and the local teacher association seeks arbitration of an issue which, in your opinion, should be decided by the Commissioner of Education and not the American Arbitration Association.

First, I would like to point out that if you as the board attorney are not being apprised of the grievances being filed in your district, I suggest that you train your school administrators to at least inform you of all controversial grievances which are filed that may ultimately be referred to arbitration. After you are informed that such a grievance is being referred to arbitration, it will be necessary to decide whether or not the subject matter of the grievance is in fact arbitrable. How do you do this?

There are no hard and fast rules to guide you in making such judgments, however, we do have certain judicial guides which we can follow. For instance, Judge Stamler in the Rockaway Township case clearly stated that the American Arbitration Association certainly has the necessary expertise to arbitrate questions of compensation, hours of work, sick leave and fringe benefits.

However, even in these areas, you must be careful in determining whether there might not be a special educational question woven into an issue involving compensation which properly belongs before the Commissioner of Education for determination. Please bear in mind that the Long Beach Island case involved the application of the board's salary schedule and the Court was of the opinion that the case should be decided by the Commissioner of Education.

In addition to the Court, the Commissioner of Education as long ago as 1968, the year that Chapter 303 was enacted into law, stated in Smith v. Paramus[4]:

> "...Where instances of inequities are believed to exist teachers have recourse to grievance procedures established by the local school district to effect a satisfactory resolution of the problem..."

Consequently, the Commissioner of Education acknowledged by way of dictum that in certain instances the proper forum would be the American Arbitration Association.

The issue involved in Smith v. Paramus was the assignment of extra-curricular activities, and the Commissioner did, in fact, decide the case.

In a case of more recent vintage, Dignan v. Board of Education of Rumson-Fair Haven Regional High School, the Commissioner of Education decided on July 29, 1971 that a teacher did not have a statutory right to an extra-curricular duty which had been assigned to him for each of several prior years. The Commissioner in his opinion went further in stating not only did the teacher not have a statutory right to the position but also he:

> "...must not acquire them (rights to non-tenure extra-curricular duties) by indirection through grievance procedures or negotiated agreements."

The Commissioner rendered the same decision in Boney v. Pleasantville Board of Education decided November 30, 1971. The latter case involved the board's refusal to appoint the petitioner to the position of chairman of the physical education department.

In essence, what the Commissioner has decided in the Dignan and Boney cases is that an alleged unreasonable or inequitable distribution of extra-curricular work among the teaching staff would be grievable and consequently the subject matter for arbitration. On the other hand, a faculty member cannot create an affirmative right to any particular

extra-curricular position by using the collective bargaining agreement as the vehicle to attain that end.

Consequently, what we have at this moment, for purposes of deciding the issue of arbitrability, are certain guides established by the Courts and the Commissioner of Education governing certain areas that properly constitute grievable and consequently arbitrable issues. Additionally, there are certain guides as to what areas are not grievable or arbitrable but, more properly, the subject matter for the expertise of the Commissioner's office.

Therefore, after you carefully analyze the facts and apply the guides we do have and conclude that in a particular case a grievance is not arbitrable, you should make certain that the local association is informed in writing that the board will not process the grievance. After this is done, permit the teacher association to make the next move.

In the event the association refers the matter to arbitration and you receive in the mail a panel of arbitrators from the American Arbitration Association, then I suggest you move quickly to obtain your restraint from the Chancery Division. Of course, this is done only after explaining your course of action to your respective boards and obtaining their respective approvals. Do not sit idly by should you receive such a panel of arbitrators because you may have an adverse award entered against your board.

I refer you in this regard to District 65 RWDSV v. Paramount Surgical Supply Co., wherein our Appellate Division stated:

> "For future guidance, we here state our considered view that Battle v. General Cellulose Co., 23NJ538 (1957) is controlling on the procedural issues presented and that Wiley (John Wiley and Sons, Inc.) v. Livingston, 376US543, 84 S. Ct. 909, 11 L.Ed. 2d 898 (1964) is not in conflict with it.
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> "Battle holds that when a party claims he has a contract with another calling for arbitration of disputes arising thereunder, and proceeds to envoke arbitration in the manner set forth in the alleged contract, there is no preliminary obligation on the demandant for arbitration first to go to Court to compel the other party to participate. He may do so, but he is not compelled to. If he decides to proceed with arbitration on the assumption that he has an agreement calling for it, then the opponent, who takes the position that there is no contract between them or that the dispute is not arbitrable, ignores notice of the arbitration proceeds at his peril of a later judicial determination that there was, in fact, a contract requiring arbitration of the dispute, and of being subjected to the award, even though he did not participate in the proceeding."

Consequently, I suggest as I have indicated above, when you get a panel of arbitrators, you must take action and take it quickly.

It is unfortunate that in New Jersey this is the method that must be employed in order to determine what is arbitrable in the public sector. Nevertheless, boards have been successful in using this method.

Undoubtedly, someone is going to ask as soon as I conclude cannot the threshold question of arbitrability be submitted to

the arbitrator for determination. And isn't this the procedure which is most frequently used?

My response to the first anticipated inquiry is, "Yes." The threshold question can be submitted to the arbitrator for his determination.

In answer to the second anticipated question, let me caution you. I referred earlier to the October 1, 1972 issue of "Arbitration in the Schools." In that same issue, which reported 50 arbitration school awards from all over the country, nine of the cases involve an issue of arbitrability which issues were presented to the arbitrator for determination. In eight of the nine cases, the arbitrator found that the matter in issue was arbitrable.

I am not prepared to say whether these were correct or incorrect determinations. They were reached by some of the best arbitrators presently functioning in the area of school arbitration. If you want the names of the cases involved, I will be happy to supply them and you can make your own determination on their correctness.

The sole determination that the issue involved was not arbitrable came in a case where a board of education had an agreement with the local teachers' association providing for a wage increase during the national freeze period. The board did not implement this contractual provision and a grievance was filed which ultimately was referred to arbitration.

The arbitrator made the magnanimous concession that the Pay Board and not he had exclusive jurisdiction to make determinations relating to salaries during the freeze period.

Gentlemen, in conclusion let me say that this area of arbitration in the public sector cannot be ignored. In my opinion, arbitration in the public sector is coming of age. School boards collectively constitute the largest employer in the state of New Jersey. More and more contracts each year have binding arbitration provisions and, if we are to effectively serve our clients, we must of necessity develop some expertise along these lines and familiarize ourselves with the body of law which is now developing and will continue to develop more rapidly in the future.

Some of the presently existing problems may be eliminated by the Public Employment Relations Commission if A-520 is enacted. Perhaps then there will be a determination as in our sister state of Pennsylvania where its Public Employment Relations Board ruled that 22 items including such familiar items as class size, involuntary transfers and specialists are non-negotiable and, consequently non-arbitrable. On the other hand, Pennsylvania teachers have the legally protected right to strike in certain instances.

If the Public Employment Relations Commission's hands continue to be tied, however, I suspect we may get a determination by our Supreme Court similar to the case in New

York by its Court of Appeals wherein practically every item which resembled a working condition is now held to be negotiable unless the board of education can show by statutory reference that it need not negotiate the item in question.

I suspect that if our legislators refuse to act and the question of what constitutes negotiable items is not squarely put before our Supreme Court, then New Jersey school board attorneys will continue to follow the plodding path of determining arbitrability in each particular case through restraints obtained in the Chancery Division of the Superior Court.

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1. 56 N.J. 579 (1970)
2. 108 N.J. Super. 301 (App. Div. 1969)
3. 55NJ 409 (1970)
4. 1968 S.L.D. 62 at 69, affirmed State Board of Education without opinion February 5, 1969; appeal dismissed by the Appellate Division September 8, 1969.
5. 117 N.J. Sup. 125 (App. Div. 1971)

VIII

The Developing Law of Sex Equality in Student Activities

HAROLD J. RUVOLDT, JR., ESQ.

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The history of civilization has been accompanied by a growth, albeit gradual, in the role of women as co-equals with men. The earliest civilization including the ancient Chinese and the early Greeks would either sell their daughters into slavery or abandon them, leaving them to die of exposure.

Even in the "enlightened" middle ages when the role and status of womenhood was glorified, the status afforded them was not that of co-equal.

All the judicial systems of the world have either ignored women completely or treated them as property. In Blackstone's Commentaries, we note the role of women to be one of the protected rather than the possessed.[1] This role of the protected person was because the female was "...a favorite... of the laws of England." With the advent of the 19th Amendment of the United States Constitution, American women were guaranteed the right to vote. This remained the major legal

recognition of American women until the Equal Employment Opportunities Pay Act of 1963,[2] and the equal opportunity employment provisions of the Civil Rights Act of 1964.[3] Quickly thereafter the courts took an activist role in establishing the rights of women. In White v. Crook,[4] a three judge constitutional court ruled it to be unconstitutional to exclude women as a class from jury duty. In United States Ex rel. Robinson v. York,[5] the United States District Court for the District of Connecticut held unconstitutional a state law which required women to be imprisoned for a period longer than men convicted for the same offense, as did the United States District Court for the District of Pennsylvania in Commonwealth v. Daniels.[6]

The subject we are concerned with today is not the inequality of periods of incarceration such as in Daniels and York, although many might argue with the kinship of educational confinement to penal confinement in some of our "school systems", nor are we discussing employment opportunities such as those addressed by the Federal Congress or by the Fifth Circuit Court in Weeks v. Southern Bell and Telephone and Telegraph Company;[7] rather we are talking about the physical and athletic relationship between high school and elementary school children. Thus the advances made in other fields may be significant from the point of view of the historian, but they are of relative value to the attorney.

One of the line of cases most frequently discussed in connection with this field are the "drinking" cases, Seidenburg v. McSorley's Old Ale House being the most prominent because of the fond memories so many share of McSorley's in its traditional state. However, in the State of New Jersey, Gallagher, et al v. The City of Bayonne,[8] is the law of the State of New Jersey. In Gallagher, Judge Matthews held that the ordinance of the City of Bayonne which prohibited females from being served at bars was null and void since it violated both the New Jersey Constitution and the New Jersey Civil Rights Act which at that time did not include the word sex. Gallagher, however, is somewhat problematic since Gallagher was decided in the Appellate Division as an unreasonable exercise of the police power in the Supreme Court's affirmances based on the language of Judge Collester in the Appellate Division,[9] as well as for the fact that in the trial opinion of Judge Matthews there was a clear concession of "I am sure that there are specific instances with such a bias 'sexual differences' may be used, especially those relating to gonadic reasons."[10] It is also interesting to note that the Civil Rights Act of New Jersey[11] specifies exceptions so as to continue the holding of Gallagher and to exclude physical activities from the pervue of the statute. In reality, the growing law of sexual equality in extra-curricular activity has been limited to a few cases in which the law has not grown. In New Jersey, Gregorio v. New Jersey State Interscholastic Athletic Association decided by Judge Crahay and affirmed by the Superior

Court, Appellate Division, and dismissed by the Supreme Court of New Jersey on the grounds that the appeal was moot, is of course clearly the law of this state at this time. The only other companion case in New Jersey was Abbey Seldin v. The State Board of Education of New Jersey, et al, instituted in the United States District Court for the District of New Jersey and stayed when it was revealed that the New Jersey Interscholastic Athletic Association was about to engage in a pilot project to gather statistics concerning intersexual competition with boys and girls. In that connection, you should be aware that today the N.J.S.I.A.A. Executive Committee ruled to exclude soccer from the pilot program and to solicit public comment on the extention of the exclusion to other contact sports.

These two cases are not to be construed as being the only cases in the country. Quite to the contrary, Hollander v. The Connecticut Interscholastic Athletic Association decided by the Superior Court of New Haven County on March 29, 1971, reached the result identical to that reached in Gregorio, as did the court in Purnell v. Pennsylvania Interscholastic Athletic Association and Harris v. Illinois High School Association. In a human rights appeal in the State of New York decided on August 1, 1972 in the case of Carol J. Adessa v. Erie County Interscholastic Conference wherein the State Human Rights Appeal Board affirmed the dismissal of a complaint of a swimming official who alleged she was

discriminated against by being assigned only to female meets as opposed to male competition. The decision is interesting, for while affirming the decision's dismissal upon the grounds of lack of jurisdiction, the Appeal Board clearly indicated that there was no justification "for continuing the practice of assigning men and women separately." With diligent search one can find three cases where the right to play in interscholastic sports between men and women was quashed by judicial fiat.[12] In each instance the ruling applied only to schools with only one team. Thus, the argument, however, cannot be disposed of lightly.

In determining whether or not they shall do so, several hurdles are important to recognize and overcome. The first issue is jurisdictional. In New Jersey at least, the rule preventing men and women from playing interscholastic sports in a head to head basis was established by the New Jersey State Interscholastic Athletic Association with their member schools and the New Jersey Association of Independent Athletic Association with its member schools. This creates a serious jurisdictional problem since the New Jersey State Interscholastic Athletic Association and the Association of Independent Schools are voluntary associations and absent an allegation of fraud and a lack of jurisdiction of the association "it is well established that the courts will not interfere with the internal affairs of voluntary associations."[13] The application of this general rule to athletic associations

generally has been consistent. Only this week the rule was applied in several cases.[14]

It is this rule which turned the tide in Reed and Morris wherein the rules were by state agencies as distinguished by voluntary associations.

Assuming one could hurdle this rather formidable rule of law, there would still remain procedural questions such as should the complaint be filed before the Commissioner of Education or before the courts or should some type of complaint be filed with the athletic association itself, "a note should be made that the New Jersey State Interscholastic Athletic Association is not covered nor is the New Jersey State Independent School Athletic Association mentioned anywhere on Title 18A, and if the proper forum is chosen, should the rule be tested under the constitutional test of whether or not fundamental liberties are threatened by the classification, or whether or not the classification is reasonable."[15]

For one of course must decide whether or not interscholastic athletics are a fundamental interest which should fall within that penumbra of rights protected specifically by the United States Constitution. For our purposes today, I will assume that the test to be applied is whether or not the classification is reasonable, recognizing that many will argue interscholastic athletic associations to be ancillary to an education and, therefore, a fundamental interest.

However, the United States Supreme Court has not as of this date determined an education itself to be a fundamental interest and, therefore, it would be presumptuous to assume that a right of a male and female to compete in head to head competition in interscholastic sports is such a fundamental interest.

In fact, courts have consistently held the opportunity to participate in interscholastic sports as a privilege and not a right.[16] The determination of which test of constitutionality may be determinative of the end result.

In New Jersey I believe the question is rapidly becoming moot. The N.J.S.I.A.A. and the New Jersey Legislature are rapidly moving toward permitting open competition in all non-contact sports. I agree with Gloria Steinem that, "Eventually men will be forced to admit that women's sphere is the one on which we live."

1. Blackstone's Commentaries on the Laws of England (book 1, Chapter 15, p. 433, 1765).

2. 29 U.S.C. Sec. 206 (d) (1964)

3. 42 U.S.C. Sec. 2000 (e) et seq. (1964)

4. 251 F. Supp. 402 (M.D. Ala. 1966)

5. 281 F. Supp. 8 (D.C. Conn. 1968)

6. 420 Pa. 642, 243 a 2d 400 (1968)

7. 408 F. 2d 228 (5th Cir. 1969)

8. 102 N.J. Super. 77 (Chan. Div. 1968) aff'd on other grounds 106 N.J. Super. 401 (App. Div. 1969) aff'd 55 N.J. 159 (1969)

9. 55 N.J. 159, 160 (1969)

10. 102 N.J. Super. 77, 82

11. N.J.S.A. 10:1-1

12. Morris v. Michigan Board of Ed., U.S. District Ct. for Dist. of Michigan So. Div. 1972; Reed v. Nebraska Schools Athletic Association (D.C. Neb. 1972); and Brenden v. Independent School District 742 U.S. Dist. Ct., Minn.

13. 6 Am. Jur. 2d 453, Associations and Clubs, Section 27; Falcone v. Middlesex County Medical Association 62, N.J. Super. 184 aff'd 34 N.J. 582 (1963)

14. McDonnell v. N.J.S.I.A.A. Sup. Ct. Ch. Div. Hud. Co.; Knox v. N.J.S.I.A.A. Sup. Ct. Ch. Div. Bergen Co.; and Schutt v. N.J.S.I.A.A. Sup. Ct. Ch. Div., Ocean Co. See also Morino v. T. H. Waters Louisiana High School Athletic Association, 220 South 2d 882 (1st Circuit Court of Appeals in Louisiana, 1969); Oklahoma High School Athletic Association v. Beret, 321 F. 2d 269 (10th Circuit); David Bartlett v. First National Federation of State High School Athletic Associations, et al., (United States District Court for the Northern District of Illinois, 1971); Percy Sanders v. Louisiana High School Athletic Associations (Court of Appeals, Third Circuit of Louisiana, 1970); Indiana High School Athletic Association v. Lawrence, Circuit Court 240 Ind. 114 (1959)

15. Compare the constitutional test of Loving v. Virginia, 388 U.S. 1 (1967) with Weather v. Louisiana, 391 U.S. 1968.

16. Cf. Morino v. Waters, supra.

Comments

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Joseph N. Dempsey is a graduate of the Syracuse University College of Law. Engaged in the general practice of law in Asbury Park, New Jersey, Mr. Dempsey has been counsel to numerous boards of education and municipalities. A member of the Monmouth County Bar Association and of the Board of Trustees of the New Jersey Association of School Attorneys, he has served as attorney for several local teachers associations and as special counsel to the New Jersey Education Association and the National Education Association.

I was asked by Mr. Martinez to respond to Mr. Ruvoldt's address and because of the lateness of the day, I have suggested to Mr. Ruvoldt and he has agreed, that we will have an argument in a bar immediately after adjournment and any of those who would want to hear us respond to one another are certainly welcomed.

Mr. Ruvoldt is from Hudson County and like lawyers from Hudson County he has three characteristics: He is charming, he is urbane and he is unreasonable. With regard to the latter, I would like to say that though I had repeated assurances that I would have an opportunity to examine his text before the speech was made, I am on the spot where I've heard it for the first time.

Because of this unreasonableness, I have conspired with the young ladies (psychiatrist, psychologist, school people, etc.) who have testified against Mr. Ruvoldt's client at

various times, to prepare a paper entitled, A Protocol of the Sexual Status of H. R., Jr.; "The patient, a moderately obese Caucasian male, chau---", but never mind that.

We might all be led to believe that the opinion of the court in the Gregorio case is authority for the proposition that an educational agency may in the proper exercise of its discretion bar a female student from participation in athletics under circumstances in which, in the judgment of the educational agency, she might be exposed to hazard. I think we may all delight in the fact that the court drew no conclusion from the psychological harm Mr. Ruvoldt's witnesses said would occur to young men who were defeated in contest by young ladies.

In any case, I thing an examination of what occurred in the case would disclose that the only thing the court held was that on the basis of discrimination against her sex, Renee Gregorio could not obtain the unusual relief of injunction.

In order to determine what the real issues decided were, it is important to examine pleadings in the case. I do not believe anybody has been made fully aware of the position pleaded by the Asbury Park Board of Education. In the first place, the case had attracted unusual public attention before any litigation began. A young lawyer in an office specializing in injury claims had been trying to assist Miss Gregorio in

what had first seemed to be a rather light hearted fashion. When the New York Times and several of the television news programs called attention to the case, the senior member of the firm leaped in. Since his attention was called to reach his kind hand of assistance to Miss Gregorio because of the features of the case that he learned from the news media, his attention was never really attracted to the issues upon which he might have succeeded. Thus, when the suit was instituted to compel the Board of Education of Asbury Park to allow her to play on the boys' tennis team, the board of education responded that it would not object to her playing on the boys' tennis team (or the sexually integrated tennis team) as long as our other interscholastic teams were not barred from competition as was threatened by NJSIAA, Mr. Ruvoldt's client. The significant thing then is that the proper educational agency, the Asbury Park Board of Education, had made the decision that Renee could play on the tennis team if their other educational responsibility to give interscholastic competitive opportunity to the balance of the students was not frustrated by their concern for her legitimate goals.

Mr. Ruvoldt, however, shepherded the trial attorney from the firm in a most careful and clever way so that he tried the case as though the issue was whether or not a girl could be barred from a tennis team by an educational agency exercising its proper authority. I believe his client's cause would have been better served, if he had insisted Asbury Park

had made a decision in her favor and that Mr. Ruvoldt's client had no authority under any stretch of any law to overrule it. In this respect, it is interesting to read the unpublished opinion of Judge Crahay, wherein he says:

> "While I have already ruled on it, I will state again that I find it to be completely reasonable and constitutional and authorized for the Commissioner to permit, either directly or by acquiescence, the rule making functions of this Association."

I was unable to find in the transcript of the trial the exact reference to this, though I believe that Judge Crahay made the decision on a motion. I have nowhere that I can find authority for the proposition that the appellate authority to overrule the board of education in a controversy rests other than with the Commissioner of Education himself, and I find no authority in Title 18A giving the Commissioner of Education the right to delegate his discretionary responsibilities or his quasi-judicial responsibilities to a private corporation. In short, it is my impression that the Commissioner of Education in permitting this organization to continue to regulate interscholastic competitive sports has abandoned his responsibility. It has too long ago been determined that athletic activity is part of the educational process to permit any further quarrel with the conclusion that something should be done in the administrative process to bring regulation of it within the Department of Education as soon as possible.